The Central Law Journal.

ST. LOUIS, MARCH 20, 1885.

CURRENT EVENTS.

TO WHAT BASE USES MAY WE COME AT LAST. The *Philadelphia Times* has been in the habit of indulging in severe strictures upon the Louisiana State Lottery. Not long since, Editor McClure, of that paper, concluded that he would visit the New Orleans Exposition. The gallant confederate generals who run that legalized swindle, caused him to be arrested for a criminal libel. He got away, it is supposed, by giving bail; and now he is publishing editorials appealing to the manhood of those great military leaders, and preaching to them that they ought not to deceive and defraud the soldiers who served under them in the late war, by lending their names to such a business. The Louisiana State Lottery is a deep disgrace to that State, and the better class of its citizens so regard it. We have a law in Missouri making the vending of lottery tickets a misdemeanor, and we understand that one person is now under sentence, in Missouri, for vending the tickets of that same lottery. If these generals were here, prosecuting their nefarious business, their great names would not shield them from the same punishment. A portion of the public press defends them and their lottery, because it derives support from the publication of their advertisements.

A NEW EXTRADITION TREATY.—A draft of a proposed treaty of extradition, between Great Britain and the United States, has been submitted by the British Goverment to the Dominion Government at Ottawa. It is said to include in its list of extraditable crimes, embezzlements, frauds committed by bankrupts, bankers, agents, factors, directors, members or public officers of any company. In other words, its aim seems to be, to reach those breaches of trust which are now so injurious to banking and commerce, and which in point of morals are worse than ordinary larceny. The need of such a treaty is very urgent. The people of the United States will profit by it even more than those of Great Britain and Canada. The grain and stock gambling which now constitutes the principal business of American exchanges, imperils every bank and puts to hazard every trust fund in the land. To devise an effective remedy for this evil is one of the immediate and urgent problems of legislation. A step in the right direction will be to frame such penal statutes and establish such treaties of extradition with other nations as shall make the escape from punishment of those who misuse trustfunds in this way impossible. Great Britain has not, we believe, any extradition treaty, either with the United States, with Norway and Sweden, or with Spain, which reaches offenses of this class; and Scandinavia and Andalusia seem to be the favorite camping places for British defaulting officials, accordingly as they prefer a warm or a cold climate.

IMPRISONMENT WITHOUT DUE PROCESS OF LAW.—In the case of *Wan Yin*,[1] Mr. District Judge Deady, of the United States District Court for the district of Oregon, has re-affirmed the extraordinary ruling which he made some time ago in the case of Lee Tong,[2] by holding that, if a man is imprisoned under an ordinance of a municipal corporation, which ordinance is *ultra vires* as being in excess of the powers conferred on the corporation by the legislature of the State in its charter, he is imprisoned "without due process of law," within the meaning of the fourteenth Amendment of the Constitution of the United States, and therefore it is competent for a Federal Judge at Chambers, without waiting for the State judicatories to decide whether the municipal ordinance is *ultra vires* or not, to discharge such person on *habeas corpus*, although no provision is made by law for reviewing his decision, in case it should happen to be erroneous. The growth of federal jurisdictions, or rather usurpation, by means of the writ of *habeas corpus*, attracted the attention of the American Bar Association at its last two meetings, and has resulted in the

[1] 22 Fed. Rep. 701.
[2] 18 Fed. Rep. 255.

introducing of a bill in Congress restoring that part of the Act of Congress of 1867, which gave an appeal to the Supreme Court of the United States in such cases. In his opinion in the case of *Wan Yin*, Judge Deady makes an undignified reply to some strictures passed upon the case of *Lee Tong*, by Judge Poland of Vermont, in the debate upon the subject at the last meeting of the American Bar Association. It is safe to say that it never was intended by the framers of the Fourteenth Amendment to give the Federal courts jurisdiction to pass on the validity of municipal ordinances in reference to the question whether they are *ultra vires* in the sense of being unauthorized by any law of the State. It was not intended to subject the police regulations of the States to the final arbitrament of this class of judges. The provision of the Fourteenth Amendment, under which these extraordinary rulings have been made, is as follows: "Nor shall any State deprive any person of life, liberty or property without due process of law." This provision was manifestly aimed at acts done *by the States*. It was manifestly intended to preserve certain rights which have existed since *Magna Charta*, and which are declared in all American Constitutions, against infringement by State legislation. It is absurd to extend it to the acts of corporations within the States, whose acts are not the acts of the State in which they exist, but are committed in violation of the law of such State. If a Federal judge can, under this pretense, get jurisdiction of an imprisonment which has been awarded by a police court under a municipal by-law, which is contrary to a law of the State in which the municipality exists, he can, with equal reason, get jurisdiction of every species of imprisonment which is contrary to the laws of the State in which the person is held. Every species of private detention, even a guardian's custody of his ward, becomes, under this ridiculous pretension, a subject of Federal surveillance.

NOTES OF RECENT DECISIONS.

WHETHER DIRECTORS ARE TRUSTEES FOR SHAREHOLDERS. — In *Gilbert v. Boen*,[3] the head-note contains this proposition: "A trust relation exists between the officers of a corporation and the corporation, but as between themselves as stockholders no such relation exists." We have looked through the opinion, which was delivered by Mr. Circuit Judge Brewer, to see what it contained in support of this remarkable statement of doctrine. We find that it contains nothing from beginning to end but a discussion of complicated facts; for which reason it ought never to have been reported. In the course of his discussion of the facts, dealing with them as a chancellor, the learned judge used this language, from which the industrious reporter, searching for a point, no doubt constructed the above proposition: "Doubtless the parties were at the time friendly, and as friends confided in each other. They worked together in a common effort to develop the mining properties of the corporation in which they were stockholders. As officers of the corporation, they occupied trust relations to it, and in the faithful performance of such trusts they would indirectly subserve the interests of the other stockholders. But trust relations to the corporation do not, as to the stockholders, create trust relations *inter sese*. Whatever duties they owed to the corporation, as between themselves they dealt at arm's length and neither had special charge of the other's interest. I fail to see any satisfactory testimony showing that Bowen was ever employed by Binckley or complainant, or ever acted as an attorney in respect to their stock or individual properties, or occupied any other confidential relations to them in respect thereto." We see nothing in this beyond the mere statement that two shareholders in a corporation are not trustees in respect of each other, a doctrine which is obvious and well-settled.[4] The doctrine that the directors of a corporation are trustees, not only for the corporation considered as an ideal person, but also for the shareholders, is as

[3] 5 W. C. Rep., 293.
[4] Pratt v. Bacon, 10 Pick. 123.
[5] Great Luxembourg R. Co. v. Magnay, 25 Beav. 586; Gaskell v. Chambers, 26 Beav. 360.

well settled as any principle in equity.[5] They are liable in equity as trustees for a fraudulent breach of their trust. The primary party to sue for such a breach of trust, in the case of a private corporation, is the corporation itself; but if the corporation refuses to sue, or is under the control of the guilty directors, one or more of the shareholders may sue in their individual names.[6]

NON-RESIDENT ADMINISTRATORS.—In *Chicago etc. R. Co. v. Gould*,[7] the decision of the circuit court was affirmed, refusing to remove an administrator, on the ground that he was a non-resident. In giving the opinion of the court, Beck, J., said: "Ordinarily, an estate having large assets which would involve the transaction of much business in its management and settlement, ought not to be intrusted to an administrator who lives in a distant State. Other circumstances may be imagined, the occurrence of which would forbid the appointment of a non-resident administrator. Indeed, it may well be said that it ought not to be done in any case, unless it be made to appear that the interests of the estate, and of heirs and creditors, will be as well protected by such an administrator as by one who resides within the State. It follows that ordinarily, and without the existence of facts above contemplated, a non-resident ought not to be charged with the duty of administering upon an estate.[8] But it cannot be admitted that non-residence alone disqualifies one, so that he cannot be lawfully appointed an administrator in the State. Code, § 2347, declares that 'if an executor removes his residence from the State, a vacancy will be deemed to have occurred.' This provision is not to be understood as prohibiting the appointment of a non-resident administrator. It simply provides that removal from the State by the administrator creates a vacancy in the place. The obvious reason for this enactment is found in the fact that, as we have pointed out above, the non-residence of the applicant is an important matter to be considered in issuing letters of administration; and, ordinarily, in the absence of circumstances and conditions requiring his appointment, it should not be made. Hence, where an administrator removes from the State there ought to occur a vacancy, for the reason that his non-residence was not considered in making his appointment. Upon the happening of a vacancy under this statute the probate court will consider the present non-residence of the incumbent, and, if it appears that, under the rules and on account of the considerations we have pointed out, he ought to continue to fill the place, he may be re-appointed. It is said that a non-resident ought not to act as administrator, for the reason that service of process and orders cannot be made upon him in the State, and thereby the settlement of the estate would be delayed and obstructed. This court has held that a non-resident administrator appointed by a court of this State, is in his representative capacity subject to its jurisdiction, and has recognized the sufficiency of a notice issued to him in the probate proceedings which was served out of the State.[9] But, should it appear that process or orders could not be served upon him for the reason of his absence from the State, or that such service was so delayed as to obstruct the prompt proceedings in the administration of the estate, it would and should be the cause of removal of the administrator; and, indeed, the non-resident administrator could be and ought to be required, by prompt periodical appearance in the court at sufficiently brief intervals, or in other ways, to afford facilities for the service of process and orders upon him, so that the settlement of the estate would not be delayed, and all persons interested therein, as well as creditors, would not be subjected to inconvenience and delay in proceedings affecting their rights. In this way an executor would be secured for the estate who, though a non-

[6] Hodges v. New England Screw Co., 1 R. I. 312; s. c., 3 R. I. 9; Forbes v. Whitlock, 3 Edw. Ch. 446; Dodge v. Woolsey, 18 How. 331; Robinson v. Smith, 3 Paige, 222; Peabody v. Flint, 6 Allen, 52; Percy v. Millandon, 8 Mart. (N. S.) 68; Brown v. Van Dyke, 8 N. J. Eq. 795; Kennebec, etc. R. Co. v. Portland, etc. R. Co., 54 Me. 173, 181; Menier v. Hooper Tel. Works, L. R. 9 Ch. 350; Colquitt v. Howard, 11 Ga. 556, 569; Greaves v. Gouge, 69 N. Y. 154; Butts v. Wood, 37 N. Y. 317; Hazard v. Durant, 11 R. I. 195; Solomons v. Laing, 12 Beav. 339; Gregory v. Patchett, 33 Beav. 595; Ryan v. Leavenworth, etc. R. Co., 51 Kan. 365.

[7] 20 N. W. Rep. 464.

[8] *In re* Estate of O'Brien, 19 N. W. Rep. 797.

[9] Huey v. Huey, 26 Iowa, 525.

resident, would administer upon it to the best interest of all concerned.[10]

CARRIERS OF PASSENGERS—BY-LAW THAT COMPANY WILL NOT BE RESPONSIBLE FOR ANY DELAY, HOWEVER GREAT. — The case of *Woodgate v. The Great Western Railway Company*, decided last week by a Divisional Court, consisting of Justices Hawkins and Smith, on appeal from the Marylebone County Court, formulates the existing law as to the contract which comes into being when a railway passenger takes his ticket, in a somewhat unpleasantly outspoken way. In the case in question the plaintiff took a first-class ticket at Paddinton station for the purpose of travelling thence to Bridgnorth. The journey to Bridgnorth is accomplished by travelling by the main line to Hartlebury Junction, and thence by a branch line to Bridgnorth. The main line train by which the plaintiff travelled was one hour and a half late in reaching Hartlebury, and before its arrival the branch line train had been despatched, so that in the result, the plaintiff, after being detained for some time at Hartlebury, finally reached Bridgnorth in a second-class carriage —the only one available—attached to a goods train, four hours after the time advertised in the company's time-tables. For this detention at Hartlebury and inferior accommodation between that place and Bridgnorth the plaintiff sought to recover damages on the ground of breach of contract, and it was held that he was not entitled to recover. Of course, it is quite clear[11] that the usual reference on the ticket is sufficient to incorporate the railway company's by-laws and regulations, so long as they are reasonable; but the lesson we gather very clearly from the case in question is, that a by-law that a company will not be responsible for any delay, however great, is a reasonable by-law, and that it is useless for a passenger to endeavor to recover damages for delay unless he is prepared to prove what is well nigh impossible in the case of a train traveling, perhaps, hundreds of miles, viz., wilful misconduct on the part of the servants of the company. The plaintiff in the case relied strongly upon the case of Hobbs v. The London and South-Western Railway Company,[12] in which the plaintiff recovered damages for the inconvenience of walking home from Esher to Hampton Court; but in that case there was clearly a breach of contract, as the defendants there represented to the plaintiff that a train which actually went to Esher was going to Hampton Court. In the present case the Court held that there was no breach of contract, as the branch line train was necessarily despatched before the arrival of the main line train, and, that being so, the defendants did all that was necessary to fulfill their contract by forwarding the plaintiff as comfortably as they could by the goods train following. Considering the extreme difficulty of the task thrown on a plaintiff of establishing wilful misconduct, we cannot help thinking this too strict a view. A company holds out in its time-tables a connecting chain of trains. By starting one of these before the arrival of its predecessor they do not, as far as the through passenger is concerned, delay it; but take it off altogether, and we confess that we are unable to see how in so doing they do not commit a breach of the contract they have entered into. —*Law Times* (London).

[10] The court also say that these views are in harmony with its former decision in *Re* Estate of O'Brien, 19 N. W. Rep. 797, and that they also find support in the cases of Wiley v. Brainerd, 11 Vt. 107, and Cambiaso v. Negrotto, 2 Adams. Ecc. 439.

[11] Watkins v. Rymill, 48 L. T. Rep. N. S. 426; 10 Q. B. Div. 178; Henderson v. Stevenson, 32 L. T. Rep. N. S. 709; L. Rep. 2 H. L. s. c. 470; Burke v. The South-Eastern Railway Company, 41 L. T. Rep. N. S. 554; 5 C. P. Div. 1.

[12] 32 L. T. Rep. N. S. 252; L. Rep. 10 Q. B. 111.

RIGHT TO RECOVER TAXES PAID UNDER MISTAKE.

It is an old and a familiar maxim that *ignorantia juris non excusat*, and upon this is founded the now firmly settled rule that money voluntarily paid under ignorance or mistake of law, with full knowledge of all the facts, cannot be recovered.[1] But money voluntarily paid

[1] Broom's Legal Maxims * 190, * 192; Kerr. Fraud, and Mist. 401; Mut. Law Inst. v. Eustein, 46 Mo. 200; Jenks v. Lima, 17 Ind. 326; Hollingsworth v. Stone, 90 Ind., 244; Adams v. Reeves, 68 N. C. 134; s. c., 12 Am. Rep. 627; Mayor v. Lefferman, 4 Gill. 425, s. c., 45 Am., Dec. 145; Bilbie v. Lumley, 2 East. 469; Elliott v. Swartout, 10 Pet., 137; Jacobs v. Morange, 47 N. Y. 57; "Ignorance of Law," 17 Cent. L. J 422; "Mistake of a Legal Right," 17 Cent. L. J. 22,

under mistake of *fact* may be recovered.[2] So money involuntarily paid on compulsion, when not legally due, may be recovered[3] And mistake of law may be connected with such circumstances as will entitle a party to relief in equity, as in case of fraud of the other party, or the like.[4]

Let us consider how far these general principles are applicable to the payment of taxes illegally assessed. What is the remedy of the property owner for illegal taxation? Can money so paid be recovered back?

In accordance with the general principles just referred to it is held without a dissenting voice, except in Kentucky and Mississippi, that in the absence of statutory enactment money voluntarily paid for an illegal tax under mistake of law but with knowledge of all the facts, can not be recovered back.[5] But "where a party not liable to taxation is called upon peremptorily to pay upon a warrant and he can save himself and his property in no other way than by paying the illegal demand, he may give notice that he so pays it by duress and not voluntarily, and by showing that he is not liable, recover it back as money had and received."[6] So a tax paid under pure mistake of fact, as for instance, where the mistake is as to the boundary of land, may be recovered.[7] In Kentucky it is held that taxes even though they are paid voluntarily under mistake of law, may be recovered back if they were illegally assessed and in "honor and good conscience" ought not to be retained.[8] The Supreme Court of that State has even gone so far as to hold that where one through mistake of his counsel as to his legal liability binds himself beyond it, equity will relieve him.[9] So in Mississippi it is held that money paid on an illegal municipal tax to one having merely formal authority to collect it, may be recovered back.[10] But these cases, as has been shown, are opposed to the current of authority.

As a general rule where the payment has not been made under mistake of fact, an action to recover money paid for taxes will lie only when the following requisites co-exist: 1. The assessment must be absolutely void and not merely irregular. 2. The money paid must have been actually received by the defendant for its own use and not as mere agent. 3. The payment by the plaintiff must have been made involuntarily and upon compulsion to prevent the immediate seizure of his goods or arrest of his person.[11]

The first requisite is, as already stated, that the assessment must be absolutely void, that is, the authority to levy the tax as laid

and authorities cited. See. however, the note to Black v. Ward, 15 Am., Rep. 171 in which Lord Mansfield's statement is approved, that "if there was no ground to claim the money in conscience, it may be recovered back."

[2] Brown v. College Corner Gravel Road, 56 Ind., 110; Citizen's Bank v. Grafflin, 31 Md. 507; s. c., 1 Am. Rep. 66; Jenks v. Fritz, 7 W. & S. 201; Wilkinson v. Johnson, 3 B & C. 429; Broom's Legal Maxims, *192; Third Nat. Bank v. Allen, 59 Mo., 310; Mayer v. Mayor, 63 N. Y. 455. Mistake in law of foreign State is regarded as mistake of fact. Haven v. Foster, 9 Pick., 112.

[3] See "Voluntary Payments," 18 Cent. L. J. 188, and authorities there collected.

[4] Adams v. Reeves, 68 N. C., 134; s. c. 12 Am. Rep. 627; Cadaval v. Collins, 4 A & E. 858; Hollingsworth v. Stone, 90 Ind. 244; Rheel v. Hicks, 25 N. Y. 289; Bales v. Hunt, 77 Ind. 355.

[5] Lamburn v. Co. Comrs, 97 U. S. 181; Powell v. Supervisors of St. Croix Co. 46 Wis. 210; Board of Comrs. v. Ruckman, 57 Ind. 96; Town of Edinburg v. Hackney, 54 Ind. 83; Jenks v. Lima Township, 17 Id. 326; Brown v. Fodder, 81 Ind. 491; Mayor, v. Lefferman, 4 Gill. 425; s. c., 45 Am. Dec. 145 note; Detroit v. Martin, 34 Mich. 170; s. c., 22 Am. Rep. 512; Sheldon v. South Dist., 24 Conn. 88; Bucknal v. Story, 46 Calf. 589; s. c., 13 Am. Rep. 220; Wabaunsee Co. v. Walker, 8 Kans. 431; First Nat. Bank of Americus v. Mayor, 68 Ga. 119; s. c., 45 Am. Rep. 476; Shane v. St. Paul, 26 Minn. 543; Union Ins. Co. v. City of Allegheny. (s. c. Penn.) 17 Cent. L. J. 374; Peebles v. Pittsburg, 30 Pitts. L. J. 118; s. c., 15 Cent. L. J. 438; Wolfe v. Marshal, 52 Mo. 167; Babcock v. City of Fond Du Lac. 58 Wis. 230; Galveston v. Gorham, 49 Tex. 279.

[6] Shaw C. J. in Preston v. Boston, 12 Pick. 14. Approved in Union Pacific R. R. Co. v. Dodge, 98 U. S. 541. See also, Atwell v. Zeluff, 26 Mich. 118; Parcher v. Marathon Co. 52 Wis. 388; s. c., 38 Am. Rep. 745; Hubbard v. Brainard, 35 Conn. 563; Grim v. School, Dist., 57 Penn. St. 434; Boston Glass Co. v. Boston, 4 Metc. 181; Lord v. Charlestown, 99 Mass. 208; Hendy v. Soule, Deady 400; Maguire v. State Saving Association, 62 Mo. 344.

[7] City of Indianapolis v. McAvoy, 86 Ind. 587; Durrant v. Eclesiastical Comrs., 6 L. R. Q. B. Div. 234, 44 L. T. (N. S.) 348; Wooley v. Staley, 1 Am. & Eng. Corp. Cas. 435. But see Jackson v. Atlanta, 61 Ga. 228.

[8] City of Louisville v. Anderson, 79 Ky. 334; s. c., 42 Am. Rep. 220; City of Covington v. Powell, 2 Met. 226; Strong reasons are given for this view. See in addition to cases cited, 20 Am. Law Reg. 687 note; 2 Pom. Eq. Jur., §§ 841, 851, and note.

[9] Fitzgerald v. Peck, 4 Litt. 125.

[10] Tuttle v. Everett, 51 Miss. 27; s. c., 24 Am. Rep. 622; City of Vicksburg v. Butler, 56 Miss. 72. But see Tupelo v. Beard, 56 Miss. 532.

[11] First Nat. Bank of Americus v. Mayor 68 Ga. 119; s. c., 45 Am. Rep. 476; Chicago v. Fidelity Saving Bank, 11 Ill. App. 165; 2 Dillon Mun. Corp. (3 ed.) §§ 939, 940.

must be wholly wanting, or the tax itself entirely unauthorized, and unless the tax is neither justly nor equitably due no recovery can be had, notwithstanding a defect or an irregularity in the assessment proceedings.[12] Thus where no regular assessment or return had ever been made by the assessor but the property was put on the tax duplicate by the treasurer, it was held on demurrer that no recovery could be had of the amount paid for such tax in the absence of an averment that the tax was neither justly nor equitably due.[13] So where a tax had been assessed upon the property of a firm after its dissolution and paid by one partner under protest, it was held that he could not recover it, unless it was shown that at the time the tax was assessed, the affairs of the firm had been wound up or that, there was no taxable property of the firm remaining undisposed of.[14]

In the second place the money collected must have come into the hands of the defendant corporation for its own use in some way. If the collector has not yet paid it over, or if the corporation acted merely as agent and had no other interest in collecting it, no action can be maintained against the corporation to recover the payment back.[15] If the tax is charged to the collector in a general settlement with him, this is equivalent to payment into the treasury.[16] It is held, however, that an unlawful tax involuntarily paid to a municipal officer under color of process may be recovered from the corporation if it has received it, although not to be used for municipal purposes.[17]

In the third place the payment must be involuntary and upon legal compulsion, and just here is where questions of difficulty most often arise. What is required to show that the payment was involuntarily made? What constitutes legal compulsion? The mere fact that a person has paid money upon an unjust demand unwillingly or even under protest, will not enable him to recover it for this is not payment under compulsion.[18] In general, it may be said, there must be some actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment over the person or property of the party paying, from which the latter has no other means of immediate relief than by paying the money.[19] In a late case in Pennsylvania, however, it is held that a payment is not compulsory merely because made under threats that a legal remedy will be resorted to for its collection. And the payment was held voluntary and not recovable although made under protest to prevent the sale of lands where an alias *fi. fa.* had issued on a judgment not a lien and the lands had been advertised for sale.[20] So a payment made to prevent a threatened prosecution or resort to legal proceedings will not on that account alone be rendered involuntary. It is held, however, by some of the courts that what is called *moral duress* may render a payment involuntary.[21] Thus where the manager of a theatre was prevented from exhibiting by an officer until he should pay a certain illegal license, and this was paid under protest, it was held that he could recover it.[22] So it is held that actual or

[12] Rogers v. Inhabs. of Greenbush, 58 Me. 390; s. c., 4 Am. Rep. 292; Preston v. Boston, 12 Pick 7; Emery v. Lowell 127 Mass. 138; Hayford v. Belfast, 69 Me. 63; Society v. Hartford, 38 Conn. 274; Cooley on Taxation 565, 565; Board of Comrs. v. McCarty, 27 Ind. 475; Wright v. Boston, 9 Cush 233; Oliver v. Lynn, 130 Mass. 143; Moss v. Cummins, 10 Rep. (Mich.) 699.

[13] Board of Comr's v. Armstrong, 91 Ind. 528.

[14] Oliver v. Lynn, 130 Mass. 143.

[15] Dewey v. Supervisors, 62 N. Y. 294; Camp v. Algansee, 50 Mich. 4; Dawson v. Township of Aurelius, 49 Id. 479; Butler v. Board, 46 La. 326; Stone v. Co. of Woodbury, 51 La. 522.

[16] Co Comrs. v. Parker, 7 Minn. 267; Babcock v. Granville, 44 Vt. 324.

[17] City of Grand Rapids v. Blakely, 40 Mich. 367; s. c., 29 Am. Rep. 539; Joyner v. Third School Dist., 3 Cush. 567. So, of course where collected by city to be paid to contractor for its own benefit. Tallaut v. City of Burlington, 39 Ia. 543.

[18] Dickerman v. Lord, 21 Ia., 338; 2 Dill. Mun. Corp., § 947; Peebles v. Pittsburg, 30 Pitts. L. J. 128, s. c. 15 Cent. L. J, 438.

[19] Brumagim v. Tillinghast, 18 Calf. 256; Radich v. Hutchins, 95 U. S. 210; First Nat Bank v. Mayor, 68 Ga. 119; s. c. 45 Am. Rep., 476; McCrickart v. Pittsburg, 88 Penn. St., 133; Lester v. Baltimore, 29 Md. 415; Wolfe v. Marshal, 62 Mo. 167; Union Railway *etc.*, Co. v. Skinner, 9 Mo. App. 189; Galveston City Co. v. Galveston, 56 Tex. 486.

[20] Union Ins. Co. v. City of Allegheuy (s. c. Penn) 17 Cent. L. J. 384, in full, Sharswood, Gordon and Trunkey J. J. dissenting. See also Mayor v. Lefferman, 4 Gill., 425, s. c. 45 Am. Dec., 145.

[21] Forbes v. Appleton, 5 Cush., 115; Benson v. Monroe 7 Cush. 125; Thompson v. Doty, 72 Ind. 336; Town of Brazil v. Kress, 55 Id., 14; Claflin v. McDonough, 33 Mo. 412; Matthews v. Smith, 67 N. C. 374; Emmons v. Scudder, 115 Mass. 387: Lehman v. Shackleford, 50 Ala., 437.

[22] Baker v. Cincinnati, 11 Ohio St., 534; And see Stephan v. Damils, 37 Ohio St., 527. See however, Hall v. United States, 9 Ct. of Claims 270.

threatened injury to one nearly related to the party making the payment may render it involuntary and compulsory.[23] And in a recent case in Missouri it is held that the payment of a water license under threats of turning off the water in case of continued refusal is a payment under compulsion and may be recovered if excessive.[24]

In the well considered case of Atwell v. Zeluff, it is said: "Any payment is to be regarded as involuntary which is made under a claim involving the use of force as an alternative, as the party of whom it is demanded cannot be compelled or expected to await actual force. * * * The exhibition of a warrant directing forcible proceedings, and the receipt of money thereon, will be in such case equivalent to actual compulsion."[25] As a general rule the tax must be delinquent and the collector must have a warrant in his hands with power and authority to make an immediate seizure.[26] But it is held in some of the cases that where the parties do not stand on equal terms and where nothing remains but to issue the warrant which must issue as a matter of course unless the tax is paid, payment under such circumstances will be deemed compulsory and involuntary.[27] Taxes paid under protest to prevent a threatened sale where they are assessed under an unconstitutional law, afterwards so adjudged, cannot be recovered because such a payment is considered voluntary, as a sale of the land under such circumstances casts no cloud on the title.[28]

The duress or compulsion must exist at the time the payment is made in order to support a recovery.[29] Thus where a party was arrested for the non-payment of a tax, but obtained his release by promising to pay it, and did pay it about a week thereafter, it was held that the payment was voluntary and could not be recovered.[30]

Perhaps the best test as to whether a payment is involuntary and upon compulsion or not, is this: Has the party making the payment a day in court, or any legal way of resisting the claim? If a party has or can have a day in court, and there is no summary way of collecting the tax so as to deprive him of his day in court, the payment, though under protest, is voluntary.[31] Thus where a tax was paid under protest to relieve a corporation from penalties only enforceable by judicial proceedings it was held to be a voluntary payment and not recoverable.[32] But where a similar tax was paid under protest to prevent the enforcement of penalties and disabilities under an act virtually excluding the corporation from business on failure to pay, and giving it no day in court, it was held a payment upon compulsion and recoverable.[33]

It is always safest to enter protest upon paying tax supposed to be illegal, but it is believed that the weight of authority is to the effect that money paid upon compulsion may be recovered whether any protest is made or not, and that protest in itself is not sufficient though it may furnish strong evidence of the involuntary nature of the payment.[34] But if

[23] Solinger v. Earle, 82 N.Y. 393; Schultz v. Culbertson, 46 Wis. 313; Smith v. Bromley, 2 Dong. 696. See however, Robertson v. Marsh. 42 Tex. 149.

[24] Butlon v. City of St. Louis, 77 Mo., 47; s. c. 3 Am. & Eng. Corp. Cas. 581.

[25] Atwell v. Zeluff, 26 Mich., 118. And see Travelers Ins. Co., v. Heath, 95 Penn., St. 333; Parcher v. Marathon Co., 52 Wis., 388, s. c. 38 Am. Rep. 745. In Howard v. Augusta, 74, Me., 79, it is held to be sufficient if the circumstances lead to the conclusion that an illegal distress for taxes will certainly be made.

[26] Woodland Bank v. Webber, 52 Calf. 73; Hendy v. Soule, Deady, 400; Co. Comrs v. Parker, 7 Minn. 267.

[27] Preston v. Boston, 12 Pick. 7; Kansas Pacific R. R. Co. v. Comrs of Wyandotte Co., 16 Kans. 587.

[28] SanFrancisco etc. R. R. Co. v. Dinwiddie, 8 Sawyer C. Ct. 312; Detroit v. Martin, 34 Mich., 170, s. c. 22 Am Rep. 512. See Wells v. City of Buffalo, 80 N. Y. 253. So held in numerous cases where licenses have been paid under unconstitutional laws. Town of Ligonier v. Ackerman, 46 Ind. 552; Noyes v. State, 46 Wis. 250; Emery v. Lowell, 127 Mass., 138; Claflin v. McDonongh, 33 Mo. 412; Town Council of Cahaba v. Burnett, 34 Ala. 400; Robinson v. City Council, 2 Rich. (s. c.) 317. But see Harrey v. Olney, 42 Ill., 336.

[29] Fellows v. School Dist. 39 Me., 559; Schultz v. Culbertson, 46 Wis., 313; Cunningham v. Boston, 15 Gra. 468; Gachet v. McCall, 50 Ala. 307.

[30] Fellows v. School Dist. 39 Me. *supra.*

[31] Marietta v. Slocomb, 6 Ohio St. 471; Ocean Steam Nav. Co. v. Tappan, 16 Blatch. 296; s. c. 7 Rep. 645; Wolfe v. Marshal, 52 Mo., 167.

[32] Ocean Steam Nav. Co. v. Tappan, 16 Blatch. 296; *supra.*

[33] Western Union Tel. Co. v. Mayer, 28 Ohio St. 521; Swift Co. v. United States, 111 U. S. 22.

[34] Fleetwood v. New York, 2 Saundf. 475; Peyser v. Mayor, 70 N. Y. 497, 501; Flower v. Lance, 59 N. Y. 503; Amesbury Co. v. Amesbury, 17 Mass. 461; Preston v. Boston, 12 Pick. 7; Brown v. McKinally, 1 Esp. 279; Sheldon v. South School Dist. 24 Conn. 88; Union Pacific R. R. Co. v. Comrs., 98 U. S. 541; Peebles v. Pittsburg, 30 Pitts. Law Jour. 128; s. c. 15 Cent. Law Jour. 438, Patterson v. Cox, 25 Ind., 261; *Contra*, McCrickart v. Pittsburg, 88 Penn. St. 138; Jackson v Atlanta, 61 Ga. 228.

the action is against a collector or mere agent, protest may be very essential.[35] Nothing very formal in the way of a protest is required.[36]

The ordinary form of action for the recovery of taxes illegally assessed and paid upon compulsion, is, of course, *assumpsit* as for money had and received.[37] Where protest has been made no demand is necessary;[38] but if there has been no protest, it would certainly be safer to make a demand before bringing suit.[39] Interest may be recoverd from the time of making the demand.[40]

In some of the States laws have been enacted by the legislatures providing, for the refunding of taxes erroneously and illegally assessed and paid. It sometimes becomes a question of no little nicety to determine whether a case falls within the provisions of the statute or not, and there has been some little controversy as to the proper form of action in such cases as fall within the statute, whether the ordinary action in *assumpsit* for money had and received, or *mandamus* must be resorted to.

Under a statute providing that "the common council may at any time order the amount erroneously assessed against and collected from any taxpayer to be refunded to him," it was held that the provision was mandatory and that taxes so assessed could be recovered by action of *assumpsit*, even though voluntarily paid.[41] It is not every case that is covered by such statutes, however. Thus where the statute provided that taxes *wrongfully* assessed should be refunded, however voluntarily paid, it was held that a mere irregular or unauthorized mode of making the assessment was not sufficient, and that it must also appear that the property was not liable to taxation or that for some reason the taxes were neither justly nor equitably due.[42] So no action to recover a tax paid under a misapprehension as to ownership caused by mistake of law, will lie under a statute providing for the refunding of taxes that are "erroneous or illegal, whether the same be owing to erroneous or improper assessment, to improper or irregular levying of the tax, or to clerical or other errors or irregularities."[43] But taxes paid where there has been no levy may be recovered under such statute.[44]

The proper remedy even under such statutes is an action for money had and received, and not mandamus.[45]

There is a class of cases in which it is held that an assessment, though voluntarily paid, may be recovered without the aid of a statute to that effect. It sometimes happens that the assessment under which taxes are paid is set aside and adjudged void although regular on its face. It is held that in such cases the law raises an implied assumption to refund the money which *ex æquo et bono* belongs to him who has paid it, and he may recover it in an action for money had and received[46] just as money paid in satisfaction of a judgment which is afterwards reversed may be recovered.[47]

W. F. Elliott.

Indianapolis, Ind.

[35] Meek v. McClure, 49 Calf. 624; VanBuren v. Downing, 41 Wis., 122; Elliott v. Swartout, 10 Pet. 137. And see Hardesty v. Fleming, 57 Tex. 395.

[36] Cooley on Taxation, 568; Borland v. Boston, 132 Mass. 89. As to requisites, see Meek v. McClure, 49 Calf. 624; Curtis v. Fiedler, 2 Black. 461; Smith v. Farrelly, 52 Calf, 77 Handing to collector simultaneously amount of tax and written protest is payment after protest, Carleton v. Ashburnham, 102 Mass. 348.

[37] Authorities *ubi supra*.

[38] Araphoe Co. Comrs. v. Cutter, 3 Col. 349; Newman v. Supervisors, 45 N. Y. 676.

[39] See Southwich v. First Nat. Bank, 84 N. Y. 420.

[40] Forrey v. Millbury, 21 Pick. 64.

[41] City of Indianapolis v. McAvoy, 86 Ind. 587.

[42] Board of Comrs. v. Armstrong, 91 Ind. 528.

[43] Dubuque etc. R. R. Co. v. Board, 40 Ia. 16.

[44] Isbell v. Crawford Co., 40 Ia. 102, and see Richards v. Wapello Co. 48 Id. 507.

[45] City of Indianapolis v. McAvoy, 86 Ind. 587; Georges Creek Coal and Iron Co. v. Co. Comrs. 59 Md. 255, s. c. 15 Rep., 271. See also Board etc. v. State, 11 Ind. 205; State v. Board, 63 Ind. 497; People v. Brooklyn, 1 Wend. 318, s. c. 19 Am., Dec. 502; 2 Dill. Mun. Corp., §§ 935, 947. But see apparently *contra*, People v. Supervisors, 51 N. Y. 401; Same v. Same, 32 N. Y. 473.

[46] Mayor v. Riker, 9 Vroom (N. J.) 225; s. c. 20 Am. Rep., 386; Jersey City v. O'Callaghan, 41 N. J. L. 349; Peyser v. Mayor, 70 N. Y. 497, s. c. 26 Am. Rep., 624.

[47] Martin v. Woodruff, 2 Ind. 237; Bank of U. S. v. Bank, 6 Pet. 8; Close v. Stuart, 4 Wend., 98; Clark v. Pinney, 6 Cow. 297.

WITNESSES — COMPETENCY OF PARTIES.

DEMAREST v. VANDENBERG.*

New Jersey Court of Chancery, October Term, 1884.

Witnesses—*Defendant Incompetent where Plaintiff is Guardian of Lunatic under New Jersey Statute.* —The complainant was, by a decree of this court, declared to be of unsound mind, and he appears in this suit (to foreclose a mortgage held by him) by guardians of his person and estate duly appointed. The defend-

*S. C., 39 N. J. Eq. (Adv. Sheets).

ant set up usury as a defense, and at the examination offered himself as a witness to prove it: *Held*, that complainant (and not his guardians, "suing in a representative capacity") was the real party to the suit, and being under a "legal disability," within the meaning of the statute, the defendant was incompetent as a witness, and that the examiner should, under the two hundred and eighteenth rule, have rejected him.

Bill to foreclose. On appeal by complainant from decision of examiner as to competency of witness.

William Prall, for complainant; *John W. Griggs*, for defendant.

THE CHANCELLOR:

The bill is filed to foreclose a mortgage. The complainant is a person of unsound mind, so declared in this court by inquisition and decree. He appears in this suit by guardians duly appointed under those proceedings. The defendant, in his answer, sets up the defense of usury. On the taking of the testimony before the examiner, he offered himself as a witness to prove the usury. The complainant's counsel objected to his being sworn, on the ground that he was incompetent to testify in his own behalf in the suit, because the complainant was prevented by legal disability from testifying. The examiner overruled the objection, and the complainant appealed from his decision.

The statute of 1859 (Rev. p. 378, § 3) did not wholly remove the disqualification of persons to be witnesses in their own behalf in suits or proceedings, by reason of interest in the event as parties. It excepted two classes of cases: one, where the opposite party was "prohibited by any legal disability from being sworn as a witness," and the other, "where either of the parties in the cause was sued in a representative capacity." The act of 1866 (Rev. p. 378, § 4), provided that a party to a suit in a representative capacity might be admitted as a witness therein, and if called and admitted as a witness in his own behalf, the opposite party might, in like manner, be admitted as a witness. The act of 1880 (P. L. of 1880, p. 52) removed the restriction from the opposite party in cases where one of the parties to the suit sues, or is sued, in a representative capacity, so far as to render such opposite party competent to testify in his own behalf, except as to transactions with, or statements by, the testator or intestate represented in the suit. In cases where one of the parties is under legal disability, which prevents him from testifying, the other party is still incompetent as a witness in his own behalf. Insanity is a legal disability. In some of the States a party is excluded from testifying in his own behalf, where his adversary in the suit is insane, by statute particularly designating that disability by name. Our statute employs a general term embracing it.

It is urged, however, that in this case the complainants are the guardians, who sue in a representative capacity. The suit is brought by the lunatic; but, being under disability, he must sue by guardian. 1 Dan. Ch. Pr. 82; Norcom v. Rogers, 1 C. E. Gr. 484; Dorsheimer v. Roorback, 3 C. E. Gr. 438. The lunatic is, in this case, the nominal as well as the real complainant. The suit is, in terms, his. But if it had been brought by his guardians alone, it would have been, in fact, his, and he would have been the party complainant within the meaning of the act of 1859.

It is also urged by the defendant's counsel, that a person of unsound mind may be a witness, if found by the court before which he is to testify, to have sufficient capacity; and that hence it may be that the complainant is not disqualified by any legal disability from testifying. That is true; but the question under consideration is whether the case, as it stands, is within the exception made by the statute. If it is, the common law rule governs the matter, and the defendant is incompetent to testify in his own behalf. It has not been made to appear that the complainant has been restored to reason, nor that, although his mental condition is not sound, he nevertheless is competent to testify in his own behalf. He appears, on the record, to be of unsound mind, and therefore under legal disability, and it is to be presumed, *prima facie*, until the contrary is made to appear, that he still continues under that disability. The object of the statute is to guard against the injustice which would arise from a want of mutuality, if one party were permitted to testify in his own behalf, while the other is unable, from legal disability, to exercise the same privilege. It was competent for the defendant to show, if he could, that the complainant was not incapacitated by disability of mental unsoundness from testifying; and if he had done so, he would thus have established his own right to be sworn in his own behalf. He did not do it. He ought, therefore, as the case stood, to have been held to be incompetent. The inquisition is not conclusive as to the existence of the legal disability to testify, but *prima facie* the state of incapacity continues until the contrary appears. It is not necessary for the complainant to show that it, in fact, continues, in order to preclude the defendant. The latter is precluded by the presumed continuance of the state of incapacity until the contrary appears. If it appears, he will be qualified to testify. If it does not appear otherwise, he may show it, if he can.

It is suggested that the examiner ought, in such cases as this, notwithstanding the objection, to swear the defendant, and then, on objection, deal with the question of the competency of his testimony as and when offered. But, as matters stood in this case, the defendant was no competent to be a witness in the cause. He was offered as a witness to prove usury—the subject of controversy—to testify upon the merits. The statute provides that a party shall not "be sworn," where the opposite party is prohibited by any legal disability from being sworn as a witness. By this is meant that he shall not be permitted to testify as to any matter in which he would not be a competent witness at the common law. Had there been an offer to prove by the defendant any matter as to which

he would have been competent to testify at the common law, he should have been sworn and permitted to give evidence as to that. But there was no such offer.

It is also said that the two hundred and eighteenth rule of this court gives the examiner no authority to refuse to swear a witness, but only authorizes him to adjudicate upon the competency of his testimony. The rule clearly extends to cases where the witness is incompetent to testify at all. It in terms empowers the examiner to decide upon all objections to evidence. This gives him authority to reject an incompetent witness. To swear a witness who is incompetent to testify, would be a mere idle ceremony. The rule sufficiently provides for the protection of parties in any case by giving an almost immediate appeal to the court itself. The decision of the examiner will be reversed.

NOTE.—That a defendant is incompetent to testify does not, of itself, render the plaintiff incompetent; as where, in a suit for specific performance of a contract to convey lands, the defendant died, and his heir at law, an infant too young to be competent as a witness, was made the defendant. Dahomey v. Hall, 20 Ind. 264.

The burden of showing the incompetency of a witness rests on the person objecting to his evidence; Alabama Ins. Co. v. Sledge, 62 Ala. 566; but if a party excluded from testifying by a general rule of law, claims a right to testify under an exception, he must make that appear at the trial. White v. Brown, 67 Me. 196.

The statutes of New Hampshire provide that a party to a suit cannot testify where the adverse party is an executor or administrator, and it was held that a party might be a witness, although the adverse party was disabled by his insanity, and the suit was defended by his guardian. Crawford v. Robie, 42 N. H. 162.

Property levied on under an execution was claimed by a third party. *Held*, that the plaintiff was competent, although meanwhile the defendant had become insane. Anderson v. Wilson, 45 Ga. 25.

The guardian of a lunatic is a competent witness in a suit between himself and the lunatic's next of kin, as to his administration of the lunatic's estate. Tarpley v. McWhorter, 56 Ga. 411.

The trustee of a lunatic husband may object to the admission of his wife's testimony, which would otherwise have been competent. Edwards v. Pitts, 3 Strobh. 140.

In an action to recover fees as a witness for the plaintiff in an ejectment brought by a lunatic through his committee, the committee is not a competent witness for the plaintiff, but the executor of the lunatic is competent. Utt v. Long, 6 Watts & Serg. 174.

Under a statute providing that in an action on a written instrument, the signature of the defendant is taken to be admitted unless he denies its genuineness, the guardian of a lunatic has no power to make such admission, and the lunatic himself cannot answer. Collins v. Trotter (Mo.), 18 Cent. L. J. 259.

In some States, parties suing or being sued by the guardian of a lunatic, are excluded by statute. Austin v. Dunham, 65 Me. 533; Little v. Little, 13 Gray, 264; Kindall v. May, 10 Allen, 59; see Garnett v. Garnett, 114 Mass. 379; McNicol v. Johnson, 29 Ohio St. 85.

As to the evidence requisite to prove a party of unsound mind, so as to exclude the adverse party, see Drew v. Buck, 12 Hun, 269; McCreight v. Aiken, Rice, 56; Doud v. Hall, 8 Allen, 410; People v. New York Hospital, 3 Abb. N. C. 230, note; Rhode Island Hospital Trust Co. v. Hazard, 6 Fed. Rep. 119.

A guardian *ad litem* is not a "guardian" within the meaning of a statute providing that where a guardian is a party, the adverse party shall be incompetent to testify; McDonald v. McDonald, 24 Ind. 68; nor does the relationship of a judge of the court to the guardian *ad litem* disqualify him from hearing the cause. Bryant v. Livermore, 20 Minn. 313; so, a surrogate may appoint a guardian for an infant, although he is a relative of the guardian; Underhill v. Dennis, 9 Paige, 202; or his son a committee for a lunatic. Hopper's Case, 5 Paige, 489.

A guardian *ad litem* is a competent witness for his ward; Walker v. Thomas, 2 Dick. 781; Lupton v. Lupton, 2 Johns. Ch. 614; and so is a plaintiff against a guardian in socage; McCray v. McCray, 12 Abb. Pr. 1 [but see Lee v. Dill, 39 Barb. 521]; the wife of such guardian is also competent. Bonett v. Stowell, 37 Vt. 258.

The declarations of a guardian in socage against the infant are not admissible for a defendant in a suit by the infant. Mertz v. Detweiler, 8 Watts & Serg. 376; Balt. R. R. v. McDonnell, 43 Md. 534.

A guardian *ad litem* is not a "party" who may be compelled to answer to interrogatories. Ingram v. Little, L. R. (11 Q. B. D.) 251.

A next friend is not a party to a suit, and hence may be a surety in replevin for an infant plaintiff. Anonymous, 2 Hill (N. Y.) 417.

A statute requiring the next friend of an infant to give security for costs, does not apply to a guardian *ad litem*. Grantmann v. Theall, 19 Abb. Pr. 308.

A next friend is a "party," within a statute requiring the party to an action to make an affidavit to obtain a change of venue. Deferd v. State, 30 Md. 179; or to make an affidavit as to what documents referred to in the bill were in plaintiff's possession; Crowe v. Bank of Ireland, L. R. (5 Irish Eq.) 578; but no order can be made against him as a "party" for the production of documents. Lawton v. Elwes, 48 L. T. (N. S.) 425; Hardwick v. Wright, 11 Jur. (N. S.) 297; see Higginson v. Hall, L. R. (10 Ch. Div.) 235.

As to the *status* of a next friend, generally. See Balt. & Ohio R. Co. v. Fitzpatrick, 36 Md. 619; Leopold v. Myers, 2 Hilt. 580; Turner v. Patridge, 3 P. & W. (Pa.) 172· Allen v. Roundtree, 1 Spears, 80.

The next friend of an infant or married woma wasn formerly incompetent, because liable for costs, Hopkins v. Neal, 2 Stra. 1026; Head v. Head, 3 Atk. 511; Davenport v. Davenport, 1 S. & S. 101; Witts v. Campbell, 12 Ves. 493; Humes v. Shillington, 22 Md. 346; Helms v. Franciscus, 2 Bland, 544; Pryor v. Ryburn, 16 Ark. 671; Hahn v. Van Doren, 1 E. D. Smith, 411; Colden v. Moore, 3 Edw. Ch. 311; but is now admissible, Burwell v. Corbin, 1 Rand. 131; Quinn v. Moss, 12 Sm. & Marsh. 365; Kilpatrick v. Stozier, 67 Ga. 247; or may act as an interpreter for the infant, Swift v. Applebone, 23 Mich. 252; the next friend's wife is competent, Dennison v. Spurling, 1 Stra. 506; even after his death, and the revivor of the suit by his administrator, Taylor v. Grand Trunk R. Co. 48 N. H. 304.

Where a next friend was also surety for the prosecution of the suit, and consequently liable for the costs, it was held that he was a party having "a legal interest which might be affected by the event of the action," and hence incompetent to testify as to any transaction or communication with a deceased party. Mason v. McCormick, 75 N. C. 263, 80 N. C. 244.

A *prochein amy* is not "a party individually named in the record," so as to be excluded as a witness for his ward. Sinclair v. Sinclair, 13 M. & W. 640; Mellnish v. Collier, 14 Jur. 621.

A guardian is not a competent witness for his ward

in an action against a third party, Clutterbuck v. Huntingtower, 1 Stra. 506; Stein v. Robertson, 30 Ala. 286; but see McCullough v. McCullough, 31 Mo. 226; nor, in proceedings between himself and his wards, Garwood v. Cooper, 12 Heisk. 101; Wilson v Unselt, 12 Bush. 215.

In a suit against a guardian, the administrator of a former guardian is competent for the plaintiff. Young v. Warne, 2 Rob. (Va.) 420.

The declarations or admissions of a guardian are not admissible against his ward, Ewell's Lead. Cas. 235; 1 Taylor's Evid. § 742; also Wrottesley v. Bendish, 3 P. Wms. 237; Walton v. Coulson, 1 McLean, 120; Bank of United States v. Ritchie, 8 Pet. 128; Evans v. Davies, 39 Ark. 235; McClay v. Norris, 9 Ill. 370; Rhoads v. Rhoads, 43 Ill. 239; Turner v. Jenkins, 79 Ill. 228; Cavender v. Smith, 5 Iowa, 157; Prutzman v. Pitesell, 3 Har. & Johns. 77; Tucker v. Bean, 65 Me. 352; Cooper v. Mayhew, 40 Mich. 528; Massie v. Donaldson, 8 Ohio, 377: Bank of Alexandria v. Patton, 1 Rob. (Va.) 499, 535; Gibbons v. McDermott, 19 Fla. 852; see, however, James v. Hatfield, 1 Stra. 548; Tenney v. Evans, 14 N. H. 343; McCarthy v. McCarthy, 66 Ind. 128; Randall v. Turner, 17 Ohio St. 262; Walsh v. Walsh, 116 Mass. 377.

Trenton, N. J. JOHN H. STEWART.

OBSTRUCTING FLOW OF SURFACE WATER.

LESSARD v. STRAM.*

Supreme Court of Wisconsin, Jan. 13, 1885.

A party will not be liable for damages caused to adjoining lands by reason of the erection of an embankment to protect his own land from overflow from mere surface water, caused by rain or melted snow, flowing through a ravine which at certain times contains running water, but which at other times is entirely destitute of water, as such a ravine is not a water-course, within the definition thereof in *Hoyt v. Hudson*, 27 Wis. 656.

Appeal from Circuit Court, Crawford county.

Thomas & Fuller, for appellant. *Wm. H. Evans*, for respondents.

TAYLOR, J., delivered the opinion of the court:

The appellant brought this action to recover damages for the alleged wrongful acts of the respondents in obstructing the flow of the water which issues out of Lhemerie coulie and turning the same onto the lands of the plaintiff. The evidence given on the trial shows that Lhemerie coulie is a hollow or ravine worn down through the hills or bluffs on the east side of the Mississippi river, in Crawford county, and that at the mouth of this coulie, and on the south side thereof, the lands of the several parties to this action are situate; the land of August Stram being nearly opposite the mouth of the coulie, and the lands of the other parties to the action lying south of his lands. All the lands are lowlands, and lie between the bluffs and the river. The evidence further shows that there is no living stream of water flowing down the coulie or out of the mouth thereof; but that during and for a short time after any considerable rainfall, water flows down said coulie onto the lowlands below the bluffs, and that there never has been any definite channel through such lowlands in which such water was accustomed to flow, but that it spread out over such lowlands. The evidence also shows that until about thirteen years ago the water coming down the coulie, before it reached the lowlands, turned to the north and did not flow upon the land of either of the parties to this action; that about thirteen years before this action was tried one of the overseers of highways of the town in which the lands in controversy are situated, on the pretense of protecting a highway which passed up said coulie, obstructed the natural flow of the water down the coulie, diverting it to the south, so that it flowed upon the lowlands of August Stram and spread out over his land. It also shows that during the same or the next year after the water was diverted by such overseer from its course north to a course in a southerly direction, the defendant, August Stram, in order to prevent the water from overflowing his lowlands and remaining there to his damage, constructed an embankment or dam, from one to three feet in height, at the east end of his land, where the water so diverted issued out of the coulie, and such embankment or dam stopped the water near the mouth of the coulie and turned it south along the foot of the bluffs in the direction of the plaintiff's lands. The other respondents had lands lying next south of August Stram's lands, and they also constructed low embankments across the east ends of their tracts of land so as to continue the flow of the water along the foot of the bluffs towards plaintiff's land, so that the water coming out of the coulie after any considerable rain or after the melting of the snow would and did flow south along the foot of the bluffs until it reached plaintiff's land, where, on account of the formation of the surface thereof, it accumulated and remained stagnant, to his injury. That the plaintiff's land was injured by reason of such water flowing thereon was clearly proved, and was not denied by the defendants.

Upon these facts appearing in the Circuit Court, on motion of the defendant the learned circuit judge nonsuited the plaintiff, and from the judgment entered upon such nonsuit the plaintiff appealed to this court. The learned circuit judge held that it was clearly established that there was no actual water-course coming down the coulie, and that all the water that flowed down and out of the same was mere surface waters which the defendants had the right to embank against to prevent their coming upon their respective tracts of land; and that if, in so doing, such water was turned in the direction of the plaintiff's land and flowed thereon, and injured it, it was a case of *damnum absque injuria*, for which no action would lie. On the part of the plaintiff it was claimed that upon the evidence it was a question of fact for the jury whether there was or was not a natural water-course down said coulie.

* S. C. 22 N. W. Rep. 284.

That there was no natural water-course down the coulie, within the meaning of the law as interpreted by this court in the case of Hoyt v. Hudson, 27 Wis. 656, was, we think, clearly shown by the evidence given on behalf of the plaintiff. One of the plaintiff's witnesses, John H. Folson, says: "This water is surface water. In time of freshets and rains there is a continuous stream of water down that hollow. * * * This water runs in that channel only when we have rains. After a rain-storm the water will continue to run from two to twelve hours. There is no living water there at the mouth of the coulie. * * * It forms a well defined water-course there when it rains. Whenever it rains there it runs down through the Lhemerie coulie in its certain particular channel to the prairie, which channel has a particular bed and banks." The plaintiff himself testified "that there is no water running in the ditch all the time nearer than a half mile from the dam. The water that follows down the coulie to the dam is caused by melting snow and falling rain." Another witness, Haines, says "he never saw any water there, except when it had been raining it ran off." Another witness says: "I never saw any water there except after a rain. Sometimes after a rain the water ran in there for two or three days."

The evidence in this case brings this alleged water-course clearly within the rule laid down by this court in the case of Hoyt v. Hudson, 27 Wis. 656, and is not such a water-course as is protected by the law, and for the obstruction of which damages may be recovered by a person injured by its obstruction. In the opinion of this court in that case of Hoyt v. Hudson, Chief Justice Dixon says: "The term 'water-course' is well defined. There must be a stream usually flowing in a particular direction, though it need not flow continually. It may sometimes be dry. It must flow in a definite channel having a bed, sides, or banks, and usually discharge itself into some other stream or body of water. It must be something more than a mere surface drainage over the entire tract of land, occasioned by unusual freshets or other extraordinary causes. It does not include the waters flowing in hollows or ravines in land, which is the mere surface water from rain or melting snow, and is discharged through them from higher to lower levels, but which at other times are destitute of water. Such hollows or ravines are not in legal contemplation water-courses." The learned chief justice then gives a brief abstract of the evidence in that case as to the nature of the water-course then in question. See pages 661, 662. From such abstract of the evidence the stream in that case was of the same temporary character as the one in question in the case at bar, and had certainly as strong a tendency to establish the fact of a water-course as the evidence in the case at bar. After stating the evidence, the learned chief justice, speaking for the court, says: "Such is a statement of all the testimony as given by the witnesses themselves, from which we think it clearly appears that it was a mere occasional flow of surface water down the ravine or hollow in question, which was obstructed by the agents and officers of the city, and not a stream or water-course within the meaning of the law on that subject." The rule adopted by this court as to the right of a land-owner to obstruct the flow of surface water upon his land is stated by the chief justice in the following language: "The proprietor of an inferior or lower tenement or estate may, if he choose, lawfully obstruct or hinder the natural flow of such water thereon, and in so doing may turn the same back, upon or off, onto or over, the lands of other proprietors without liability for injuries ensuing from such obstruction or diversion."

The case at bar is, in all its material facts, the same as the case above cited, and must be governed by it. The water obstructed by the defendants, and turned from the lands upon the lands of the plaintiff, was surface water. They did not permit the surface water to collect in large quantities upon their lands, and then discharge them in unusual quantities upon the lands of the plaintiff, so as to bring the case within the rule laid down in the case of Pettigrew v. Evansville, 25 Wis. 223; they simply fenced against the surface water from adjoining lands, as they had the right to do; and if in so fencing against such water it was diverted upon the plaintiff's land, he has no action against the defendants. The acts of the defendants being lawful in the eye of the law, any injury suffered by reason of such lawful acts is not a good ground for an action. The rule laid down by this court in Hoyt v. Hudson, above cited, has been adhered to in the following cases: Pettigrew v. Evansville, 25 Wis. 223, 238, 239; Fryer v. Warne, 29 Wis. 511; Eulrich v. Richter, 37 Wis. 226; Allen v. Chippewa Falls, 52 Wis. 434; s. c., 9 N. W. Rep. 284; O'Conner v. R. Co., 52 Wis. 530; s. c., 9 N. W. Rep. 287; Hanlin v. R. Co., 21 N. W. Rep. 623. We see nothing in the facts of this case which would justify us in making it an exception to the general and well-established rule of this court upon the real question in issue between the parties. It follows that the nonsuit was properly ordered by the circuit court.

The judgment of the circuit court is affirmed.

FOREIGN EXTRADITION — AUTHENTICATION OF DOCUMENTS.

IN RE BEHRENDT.*

United States Circuit Court, Southern District of New York, Dec. 29, 1884.

1. EXTRADITION — *Authentication of Documents — Rev. Stat. § 5271 — Act of August 3, 1882.* — Section 5, of the act of August 3, 1882, restores in substance the provisions of the act of June 22, 1860, as respects the mode of authentication of documentary evidence in

* S. C. 22 Fed. Rep. 699.

extradition proceedings, and supersedes also the provisions on that subject of section 5271 of the Revised Statutes.

2. —— *Forgery— Affidavits.*—Where the evidence of criminality consisted of affidavits, appearing to be taken in a criminal court upon a charge of forgery, authenticated by the royal judge of Prussia to be valid evidence according to the laws existing in Prussia, *held*, equivalent to a statement that such documents were valid evidence there of the crime of forgery charged.

3. —— *Certificate of Diplomatic Officer.*—The certificate of the principal diplomatic officer of the United States, in the language of the statute, *held* also sufficient.

Extradition and *Certiorari*.

A. L. Sanger, for petitioner; *Edward Salomon*, for the Prussian government.

BROWN, J., delivered the opinion of the court:

The petitioner, Behrendt, having been held by the United States commissioner for extradition to Prussia, on a charge of forgery, under the treaty of June 16, 1852, has been brought before me upon *habeas corpus*, together with a record of the proceedings under a writ of *certiorari*. The discharge of the prisoner is sought upon two grounds: that the evidence of forgery is insufficient to hold him; and that the documentary proof received by the commissioner is not properly authenticated. The evidence of criminality is drawn wholly from the documentary proofs, consisting of depositions taken in Prussia. These depositions purport to be taken in penal or criminal proceedings against the petitioner there; and in some of the papers it is expressly stated that they are taken in a criminal court, and on the charge of forgery. These proceedings are certified by the royal Prussian judge of the court at Marienburg, who certifies that "this judicial proceeding, with respect to its form, is valid evidence, according to the laws existing in Prussia." The signatures are certified, as required by the act of August 3, 1882, § 5, and the whole is finally authenticated by the United States minister at Berlin, who certifies that the signatures are genuine; that the documents are entitled to full faith and credit; and that the said "documents, which are intended to be offered in evidence upon the hearing within the United States of an application for the extradition of Joseph Moses Behrendt under title 66 of the Revised Statutes of the said United States, and for all the purposes of such hearing, are properly and legally authenticated, so as to entitle them to be received for similar purposes by the tribunals of Prussia."

Section 5 of the act of August 3, 1882, restores in substance the provisions of the act of June 22, 1860, (12 St. at Large, 84,) as respects the mode of authentication, and supersedes the provisions on that subject of § 5271 of the Revised Statutes, as well as those of the act of June 19, 1876, (19 St. at Large, 59). The certificate of the royal judge that the judicial proceeding certified to "is valid evidence according to the laws existing in Prussia," reasonably interpreted, can mean nothing less than that, according to the law of Prussia, such documents are valid evidence of criminality as regards the crime charged in the proceedings specified in the court where the proceeding purports to be had. This is all the evidence that is required under the first branch of the statute; since the proceeding appears upon its face to be a criminal one, and in a criminal court, upon a charge of forgery.

The final authentication by the United States minister is in the exact language of the statute. Whatever ambiguity there may be in the statutes, from the use of the words "similar purposes," there is no greater ambiguity in the certificate itself; and, as it exactly conforms to the statute, it must be held to mean whatever the statute means, and cannot, therefore, be held defective. *In re* Farez, 7 Blatchf. 345, 353; *In re* Wadge, 15 Fed. Rep. 864; 16 Fed. Rep. 332.

In the Case of George Fowler, 18 Blatchf. 430; s. c., 4 Fed. Rep. 303, Blatchford, J., says, in reference to the final certificate of the principal diplomatic officer of the United States: "Such certificate, if in proper form, is absolute proof, whatever may be the tenor of the certificates of foreign officials to the same documents." Page 437. By this rule, even if the previous authentication were defective, the final certificate of the United States minister would supply the defects; but for the reasons above stated there are no substantial defects in the certificates of the Prussian authorities. The documentary evidence, therefore, being competent evidence, the decision of the commissioner upon the weight of proof would not be interfered with on *habeas corpus*, unless there be clear insufficiency in the evidence to afford a *prima facie* case against the petitioner. The evidence in this case, though circumstantial, bears so strongly against him that I am not authorized to interfere with the commissioner's conclusion in this respect. The application for the release of the prisoner must therefore be denied, and the prisoner remanded to the custody of the marshal.

WEEKLY DIGEST OF RECENT CASES.

1. AGENCY.—*Powers of a General Agent.*—An agent, the principal being absent from the country and not heard from for some time, having full charge, management and control of the principal's business, that of a retail grocer, must necessarily possess and exercise the same power and authority in the busi-

ness that his principal could, if present. A general agency, until revoked, is co-extensive in scope and duration with the business. *Fire Ins. Co. v. Grunert*, S. C. Ill., Ottawa, Nov. 17, 1884.

2. ———. *Power of General Agent to Sue for his Principal.*—When a principal is out of the country, his general agent having sole authority to manage his business, will necessarily have authority to bring suits to collect debts, and insurance in case of loss by fire, such power being essential to an efficient discharge of his duties. *Ibid.*

3. CONTRACTS.—*Parol Evidence to Contradict—Evidence that Promissory Note was not to be Paid According to its Tenor.*—In a suit on a promissory note the defense was that the note was given for a note of like amount placed in defendant's hands for collection, and was not to be paid unless the note so handed to the defendant was collected by him. This was directly contradicted by the plaintiff. *Held*, that the court below should have given a binding instruction to the jury to find for the plaintiff. The uncorroborated testimony of a single wtness contradicted a writing, which writing is corroborated by plaintiff's testimony, is not sufficient to overthrow the written contract. [The court say: The defendant's testimony amounts to no more than that the note was not to be paid according to its terms, but only on the contingency that he should be able to collect another note from the Union Forge Company. That such evidence is no defense was decided in Hill v. Gall, 4 Barr, 493; Anspach v. Best, 2 P. F. S. 356; Hacker v. The National Oil Refining Co., 20 P. F. S. 92; Hirst v. Hart, Id. 286.] *Phillips v. Meily*, Sup. Ct. Pa., June 11, 1884; 42 Leg. Int. 18.

4. CONVEYANCE.—*Set aside only on Clear and Satisfactory Evidence.*—When title is vested by deed in a person claiming under it, the court will never disturb the title unless it is clearly and satisfactorily shown that another is in equity entitled to the land. *Sandford v. Finkle*, S. C. Ill., Ottawa, Nov. 17, 1884.

5. ———. *Destruction does not Divest Legal Title.—When it Passes Equitable Title.*—Where a husband after having received a deed for a lot from his wife's parents, and when about to go west on a trip, surrendered the deed to them for the purpose of having them convey the lot to his wife, and his deed was destroyed, it having never been recorded, and a new one made to his wife, in which he acquiesced for seventeen years before suing for a deed, it was *held* that the surrender of his deed and the making of one to his wife did not divest his legal title, but passed an equitable title to his wife which a court of equity would protect. *Ibid.*

6. ———. *Consideration of Settlement on Wife.*—Marriage is a sufficient consideration for a settlement upon a wife, and so is an existing marriage relation, if it in no wise affects the claims of existing creditors. *Ibid.*

7. CONVERSION.—*Refusal to Deliver, when Evidence of Conversion.*—Where a person having in his possession a chattel of another refuses to deliver it to the owner, or her agent, on demand such refusal is evidence of a conversion. *Singer Manf. Co. v. King*, S. C. R. I., June 2, 1884; 18 Repr. 637.

8. ———. *When Bailee may Refuse to Deliver to Person other than Bailor.*—A bailee of a chattel which is demanded by a person other than the one from whom the bailee received it, has a right to refuse to deliver it until he has had time to satisfy himself as to the ownership of the chattel. *Ibid.*

9. ———. *Servant Receiving from Master may Refuse to Deliver to Third Person when.*—A servant who has received a chattel from his master may refuse to deliver it, on demand of the owner, until he has had an opportunity of consulting his master; but if after consultation with his master he relies on the latter's title and refuses to surrender the chattel he will be liable for conversion. *Ibid.*

10. ———. *Holding for Storage where no Storage is Due.*—Where an agent receives from a fellow agent of the same employer a chattel with instructions to hold it until storage thereon is paid, and no storage is due thereon, he cannot refuse to surrender the chattel without being guilty of a conversion. *Ibid.*

11. CORPORATION—*Liability of Officers for Wrongs done by their Order.*—If an officer of a private corporation performs an illegal act, or such act is performed by his orders, where he has authority to control the servant doing the act, and such illegal act results in injury to another, he will be liable in damages to the injured person; nor will he be exonerated from such liability, from the fact that the corporation may also be liable. 2. Where the president of an omnibus line, an incorporated company, promulgated an order to all drivers to exclude all colored persons from riding in their conveyances, and in pursuance of such order, a driver ejected the plaintiff from his omnibus, thereby inflicting a personal injury: *Held*, that the president individually was clearly liable to the plaintiff for the damages received. *Peck v. Cooper*, S. C. Ill., Ottawa, Nov. 17, 1884.

12. ——— *Franchise—Stock—Paid-Up.*—The statutory condition attached to the grant of a corporate franchise, that one-half of the capital stock "has been actually paid up in lawful money of the United States," is substantially complied with, the corporation has received property as payment, the market value of which is greater than the par value of the stock. *State ex rel v. Wood*, S. C. Mo., Feb. 23, 1885.

13. ——— *Stockholder's Liabilities—Limitations.*—Corporate stock must be paid for in money or money's worth. An issue of $100,000 of paid up stock for only $12,000 worth of property received in payment of it by the corporation is fraudulent, and those stockholders who take it are liable on corporate debts, for the proportionate difference. 2. Where no suit is brought against the corporation within one year after the maturity of the debt; no execution has been returned unsatisfied in whole or in part; and suit brought against the defendant stockholders more than two years after they ceased to be stockholders in such corporation, such defendants are not liable under the terms of § 940 Rev. Stat. *Priest v. White*, S. C. Mo., Feb. 2, 1885.

14. CRIMINAL PROCEDURE—*Grand Jury—Indictment Found without Evidence.*—1. An indictment found by a grand jury without any evidence of the charge being produced before it, will be quashed, upon the facts being made clearly manifest to the court. 2. Though in this State a grand juror is incompetent as a witness, to show such misconduct on the part of himself and his fellows, yet if the defendant on the hearing of a motion to quash and

plea in abatement, seek to prove by the prosecuting attorney, that the indictment was indorsed by the foreman, and returned into court on his recommendation and suggestion, that a former grand jury had investigated the facts and determined upon the indictment, but by accident had failed to return it, it is error for the court to refuse to admit it. *State v. Grady*, S. C. Mo., Feb. 16, 1885.

15. DEED—*Delivery— Fraud—Acknowledgment.*—1. Where it appears that a woman wishing to borrow a sum of money on certain lands, is informed by a lawyer, boarding in her house, of certain money offering for loan, and brings her a blank deed of trust, and a blank bank note, which she signs, but does not acknowledge, and he takes them away, saying that he has not time to fill up the blanks at that time, and he does afterwards fill the blanks, and being a notary public, writes out the certificate of acknowedgement, passes the deeds to the lender and pockets the money, such facts will not constitute delivery of the deed. Such lawyer is not in any proper sense her agent; delivery will not be presumed of an unacknowledged deed. 2. Where it is pleaded that a deed was neither acknowedged or delivered, and was therefore a fraud, and the reply tendered the general issue, the question of estoppel by the deed cannot be raised. An estoppel *in pais* must be pleaded. 3. An answer averring that a deed was never delivered, does not need to be verified as a plea of *non est factum*. 4. Where there is no agency there can be no ratification. *Hammerslough v. Cheatham*, S. C. Mo., Feb. 23, 1885.

16. DIVORCE—*Abandonment—Pleading.*—The allegation in a bill for divorce by the wife that her husband offered her such indignities as rendered her condition intolerable, and that she left his bed and board in consequence thereof, and has remained away ever since, but has repeatedly begged him to resume marital relations with her and that he refused, is not equivalent to the statutory allegation of abandonment. 2. Where a decree dismissing the bill and cross-bill in a divorce proceeding is sustained by the evidence it cannot be disturbed on appeal. *McKeehan v. McKeehan*, S. C. Mo., Feb. 23, 1885.

17. EQUITY—MANDATORY INJUNCTION—REMOVAL OF BUILDING OBSTRUCTIG PUBLIC WAY.—1. In an equitable proceeding by a private individual to compel the removal of a building as an obstruction of a highway the plaintiff must show a special injury suffered by himself other than and different from that which he suffered in common with the general public. 2. Where a way is dedicated to public use, such dedication is wholly inconsistent with the continued and contemporaneous existence of a private easement of way independent of the public right. 3. Courts of equity will not exercise their extraordinary jurisdiction by mandatory injunction if the right by which it is to be sustained be apparently doubtful until it is established at law. 4. The injury to repair which such a remedy is invoked must amount to irreparable damage, incapable of being fully compensated by damages at law and substantial and not unimportant and trivial, more especially if the effect of granting the relief would be to inflict serious damage upon the defendant. *Bailey v. Culver*, S. C. Mo., Feb. 23, 1885.

18. ESTOPPEL — *May be Shown without being Pleaded.*—When the defendant in an action on an insurance policy, pleads that plaintiff failed to furnish proofs of loss in the time required, the latter may reply that such proof was waived, but such replication is not necessary to the admission of proof of such waiver. The doctrine of waiver in this connection, is in substance and effect that of an *estoppel in pais*, and such estoppel at common law need not, although it might be pleaded specially.—*Fire Ins. Co. v. Grunert*, S. C. Ill., Ottawa, Nov. 17, 1884.

19. FIXTURES — *Hay-Scales.* — Hay-scales constructed by digging in the land and walling up the excavation, and placing the scales in and upon this wall, pass to heirs as land. A bill of sale not under seal, of such scales made by the majority of the heirs will convey no interest in them. *Dudley v. Foote*, S. C. N. H., Aug. 28, 1884; 18 Rep. 631.

20. FRAUDULENT REPRESENTATIONS — MATTERS OF RECORD.—1. Where the directors of a corporation, the property of which is subject to the lien of a deed of trust, issue bonds for a further indebtedness, purporting on their face to be first mortgage bonds, and cause them to be represented and sold as first mortgage bonds, a petition against them setting out these facts and misrepresentations, is not demurrable on the theory that the plaintiff might, by having recourse to the record, have ascertained the condition of the title. *Clark v. Edgar*, S. C. Mo., Feb. 23, 1885.

21. GENERAL AVERAGE—*Fire Extinguished by other Parties.*—If a fire on a vessel, moored to her wharf in a city, is extinguished by the fire department of the city, acting solely under its municipal authority, and not at all under the direction or at the request of the officers of the vessel, the cargo saved is not the subject of a general average. *Wamsutta Mills v. Old Colony Steamboat Co.*, S. C. Mass., Sept. 5, 1884; 18 Repr. 625.

22. HOMESTEAD — *Of Husband and Wife in each others property.*—A husband hasan unquestioned legal right to live with his wife and enjoy property by him settled upon her, as a homestead, as fully as if the title was in him. So has the wife the same rights of homestead in property of which he has the legal title. *Sanford v. Finkle*, S. C. Ill., Ottawa, Nov. 17, 1884.

23. —— *Sale of Reversionary Interest after Removal from State.* Where a homestead was sold for the purpose of the removal of the family to another State, and the making of a reinvestment there, the reversionary interest of the head of the family, in the hands of the purchaser, was subject to levy and sale by a creditor of the former. *City Bank of Macon v. Bryant*, S. C. Ga., Oct. 24, 1884; 18 Repr. 615.

24. —— *Sale of Homestead for Reinvestment.*—The policy of this State is to increase, not diminish, its population; and the policy of the homestead laws in the Constitution, is to secure homes to the people of the State, and to settle them permanently within its limits; and in case of a sale of the homestead for reinvestment, the intention is that such reinvestment shall also be within the State. *Ibid.*

25. —— *Subrogation of Purchaser's Right of Homestead.*—While a purchaser may be subrogated to the rights of the head of the family, yet a sale and removal from the State terminates any immunity from levy, at least as to the reversion. *Ibid.*

26. ——— *Notice by Record of Homesteader's Intention to Remove.*—The proceedings to sell the homestead being by law recorded in the county where the land lay, and the petition to sell showing on its face, the intention to remove and settle in another State, the purchaser had notice thereof. *Ibid.*

27. HUSBAND AND WIFE—*Reducing Wife's Property into Possession—Legacy to Wife.*—P died in 1852, and by will made C and his wife residuary legatees, and appointed C his executor. C made a note to his wife "for her share of P's residuary bequest," but kept such share in his own possession, and mingled it with his own property, with the consent of his wife. *Held*, that the husband had reduced his wife's share to his own possession, and that his executor was not liable to her on a bill in equity for her share of the estate of P. *Bridgman v. Bridgman*, S. C. Mass., Nov. 1, 1884; 19 Rep. 210.

28. INJUNCTION—*Against Illegal Public Expenditures at Suit of Tax-Payer.*—1. A taxpayer has the right to ask the court to restrain, by injunction, the county commissioners from making an illegal expenditure of the money raised by taxation. 2. When the clerk of the circuit court is required to do certain work, and is allowed, by way of compensation to collect certain fees from the parties having the work done, the payment to him of an extra sum for doing such work is such an illegal expenditure. *Peter v. Prettyman*, Ct. of App. of Md., Oct Term, 1884; 13 Md. Law Rec. 147.

29. INSTRUCTIONS—*Court not Bound to Modify or Put in Form.*—The court is not bound to give an instruction prepared by either party unless it is correct. Modifications may be made, but the court is not absolutely bound to make any. *Umlauf v. Umlauf*, S. C. Ill., Ottawa, Nov. 17, 1884.

30. ——— *Explaining the Reason for Refusing Others, Asked.*—The court gave the jury an instruction on its own motion in the first part of which was stated the reason why certain instructions were refused: *Held*, that this was not a proper subject for the consideration of the jury, but as it could not affect the verdict was no ground for reversal. *Pa. Co. v. Frana*, S. C. Ill., Ottawa, Nov. 17, 1884.

31. LIMITATION.—*Adverse Possession as Between Husband and Wife.*—Many years after a husband had surrendered to the grantors his deed for land and had them convey to his wife, in which he acquiesced for seventeen years, he filed a bill to cancel the deed to his wife and to compel the grantors to convey to him. His long possession was set up as affording a presumption of his ownership and as giving ground to have his wife's deed set aside as a cloud on his title. *Held*, that as his possession was not adverse to the wife, it could not avail, and that she, residing with him all the time, was in possession to the same extent that he was. *Sandford v. Finkle*, S. C. Ill., Ottawa, Nov. 17, 1884.

32. MARRIAGE SETTLEMENT.— *Equitable, or such as may have been Forced in Equity.*—Where a husband surrenders his deed for land to his grantors to enable them to convey the same to his wife, which is done and his deed destroyed, this will amount to settlement by him upon her, in equity. It is an equitable gift that a court of equity will sustain. *Ibid.*

33. MARRIED WOMAN'S DEED.—*Evidence that she did not Understand its Purport — Evidence to Support Reformation of Instrument.*— The acknowledgment before a magistrate of the due execution of a mortgage by a married woman, cannot be overthrown by her mere statement that she did not fully understand the paper. The uncorroborated oath of the maker of an instrument of writing, contradicted by the oath of the opposite party, is not sufficient evidence to submit to the jury upon the question of the reformation of the instrument. *Oppenheimer v. Wright*, S. C. Pa., June 11, 1884; 42 Leg. Int. 18.

34. MECHANIC'S LIEN.—*Notice — Discrepancy.*— 1. Where the preliminary notice which the material man is required by the mechanic's lien law to give to the owner of the property, refers to material furnished for the erection of "a double two-story brick building," located in a certain place, whereas in the petition they were described as used in the "construction of a double two-story brick dwelling house *and a one-story brick stable and the fences and sidewalks*," the discrepancy is immaterial. 2. The account attached to a petition for mechanic's lien is a sufficient compliance with the law, if it conforms to the usage prevailing with merchants and the trade generally. 3. Material men may be entitled to a lien for a fence and pavement provided they were included in the same contract as the dwelling and stable. *Henry v. Plett*, S. C. Mo., Feb. 23, 1885.

35. NEGLIGENCE.—*Telegraph Companies—Stipulation against Liability for Negligence Applies to Deliver in Season.*—The sender of a telegram assented to the printed stipulation in the blank forms, that the company should "not be liable for delays in the delivery of an unrepeated message, whether happening by the negligence of its servants, or otherwise, beyond the price of the message." By some unexplained delay of the messenger boy, the message was not delivered in season; but no other negligence was shown. *Held*, that the contract applied to such negligence, and that plaintiff could recover only the amount paid for the message. *Clement v. Western Union Tel. Co.*, S. C. Mass., Sept. 3, 1884; 18 Repr. 624.

36. ———. *Defendant's Agency — Defective Appliances.*—1. In a suit by an employee against his employer for personal injuries received by the breaking of a chain used in loading logs on a railroad car, the fact that the defendant was acting as the agent of others is immaterial, if it appears that the plaintiff was not aware of the fact of agency until after his injury. 2. Plaintiff being inexperienced in such work had a right to rely on defendant's assurance that the chain was sufficient. *Maline v. Morton*, S. C. Mo., Feb. 23, 1885.

37. ———. *Liability of City—Defective Sidewalk.*— Where a city charter devolves on it the power to open, grade and establish streets, sidewalks, etc., such power is legislative in its character, and the city cannot be compelled to exercise. But when it has assumed to exercise it, and has opened and established a street, the duty to keep it in repair is a ministerial duty, for negligence in the performance of which it is liable in damages to one sustaining an injury in consequence thereof. 2. Where a city keeps such part of a street or sidewalk in reasonable repair as may be necessary for the use of the travelling public, it is not liable for injury sustained by one who, in the exercise of ordinary care, may be injured on some other part of such street or sidewalk which may be out of

repair, and over which he may be passing, notwithstanding the corporation may have ordered the whole street or sidewalk to be opened and kept in repair. *Fritz v. Kansas City*, S. C. Mo., Feb. 23, 1885.

38. ———. *Municipal Corporation — Contractor's Negligence.*—The rule that a city letting the contract for doing public work, retaining no control or direction of the contractor or his servants, will not be rendered liable for injuries to a third party caused by the negligent manner in which the work is prosecuted by the contractor, is not varied by the fact (1), that the city reserves the right for the city engineer to direct the work with reference to the workmanship and quality of material, and the contractor agrees to discharge any workman who disregards the engineer's directions in these particulars; and (2) that the city reserves the right to stop the work and annul the contract whenever, in the judgment of the city engineer, there was good reason for doing so. *Blunt v. Kansas City*, S. C. Mo., Feb. 23, 1885.

39. ———. *Railroad — Damnum Absque Injuria.*—Where a railroad company's embankment was washed out by repeated floods, and was replaced by a trestle, the work being prudently and carefully done, which permitted the water to flow through, and did not protect the plaintiff's land as the embankment had done, the damage to plaintiff's land was *damnum absque injuria*, and no cause of action. *Jones v. Iron Mountain R. Co.*, S. C. Mo., Feb. 23, 1885.

40. ———. *Railroad—Depot Approach.*—1. Where it appeared that there was a crossing over a railroad track near a depot, which was used by those having business with the company in transporting passengers and freight to and from its depot and grounds, and that the fact of such use was necessarily known to, and apparently acquiesced in by the company for a long time: *Held*, that it was the duty to keep such crossing in a reasonably safe condition and repair for the use of such persons. 2. If the plaintiff being on the defendant's grounds in pursuance of business being transacted with the company, and in the exercise of due care and diligence suffered injury in consequence of the failure of the company to maintain its grounds and crossings and depot in a reasonably safe condition, then the defendant is liable. 3. A railroad company which holds out an inducement or invitation to the public to enter or leave its depot grounds, by a way, or crossing, or road, by means of which the public are induced to or do pass upon and off from its said depot grounds, is bound to make and keep such way, or crossing, or path, reasonably safe for such travel. *Moore v. Wabash, etc. R. Co.*, S. C. Mo., Feb. 23, 1885.

41. OFFICIAL BOND—*Statutory Lien.*—Where the statute provides that the collector of revenue shall make a bond conditioned that he will pay over all revenue "for the two years next ensuing the first day of February, thereafter" and the bond inadvertently expressed the time "for the two years ensuing the first of January, 1875, etc.," the difference is immaterial and does not affect the statutory lien of the bond on the collector's real estate. 2. The statutory proceeding by motion for judgment against a collector and his bondsmen, of revenue for sums collected and not paid over is in no sense an *ex parte* proceeding, and no reason is perceived which it should not be taken after as well as during the officer's term. 3. It is not necessary that the judgment in such a proceeding should ascertain the lands upon which it declares the lien because the statute makes the collector's bond when filed for record after approval, a lien on all his lands. *Wimpey v. Evans*, S. C. Mo., Feb. 23, 1885.

42. PLEDGE—*Possession, when Necessary to Validity.*—Possession of the thing pledged must be taken by the pledgee to make the pledge valid against the creditors of the pledgor. An exception to this rule is where the thing pledged is an interest in expectancy or an intangible interest. *Wallace's Appeal*, S. C. Pa., Jan. 7, 1884; 42 Leg. Int. 18.

43. PROMISSORY NOTE—*Alteration by Agreement between Parties.*—A material alteration in a note, made in accordance with an agreement between the maker and payee, does not avoid the note as to the maker, although the change was made sometime after the agreement, and without knowledge on the part of the maker that the agreement had been made effective by the actual alteration of the note. *Wardlow v. List*, Ad'mr, S. C. Conn., Dec. 9, 1884; 13 Week. Law. Bul. (Cinn.) 104.

44. RAILWAY AID NOTES—*Substantial Compliance with Conditions.*—Where railway aid notes were given which stipulated among other things, 1, That a depot should be built within three quarters of a mile of a certain court house. And 2, that the road should be "done, completed and put in operation" before a certain day, otherwise such notes to be void and of no effect, it was held to be a substantial compliance with contract on the part of the railroad company if 1, the depot were erected at a point within three quarters of a mile by a direct line, though it was further by the traveled way; and 2, if by the day limited the road were complete and in operation to the terminal point, except one mile, over which mile, the company ran its cars on the track of another railway, especially as the last mile was graded and ready to be ironed. *Mo. Pac. R. Co. v. Tygard*, S. C. Mo., Feb. 16, 1885.

45. RAILWAY NEGLIGENCE—*Killing Stock—Ordinance Regulating Speed of Trains in Corporate Limits.*—1. In an action for killing stock within the corporate limits a town, where it appears that the train at the time of the accident, was running at a rate of fifteen to twenty miles an hour, it is not error to allow plaintiff to prove an ordinance of the town forbidding trains to be run within its limits at a greater rate than six miles an hour, although such ordinance was not pleaded, as bearing on the question of negligence in the management of the train. 2. The stopping of railway trains within a certain distance, is a matter of common observation, and the court will not assume that it is within the exclusive knowledge of experts. 3. Towns of the fourth class have power under the statute to pass ordinances regulating the speed of trains, within their corporate limits. 4. Such an ordinance is not void as unreasonable. *Robertson v. Wabash, etc. R. Co.*, S. C. Mo., Feb. 23, 1885.

46. RES JUDICATA—*Refusal of Probate of Will, when Conclusive.*—The refusal of probate to a will of real estate, after issues framed in the Orphans Court for trial before a jury in a court of law, and a verdict thereon adverse to the will, effectually concludes the devisee; and he cannot thereafter proceed by ejectment upon the will itself, without probate, and renew the issue as to its validity in that way, before another court and jury. *Johns*

v. Hodges, Md. Ct. of App., Oct. Term, 1884; 13 Md. Law Rec. 149.

47. SET-OFF — *Bank Cashier — Overdraft.*—1. A cause of action accruing to a bank against its cashier for wrongfully permitting an overdraft arises on contract within the meaning of the statute relating to counter-claims. 2. The pendency of a suit by the bank against the cashier, for this breach of his bond, does not affect the bank's right to set up the overdraft as a counterclaim to a demand claimed by the cashier's assignee against the bank. 3. A counterclaim may be made to a claim by the debtor's assignee in the circuit court, though it has not been pleaded before the assignee. *St. Louis Board Public Schools v. Broadway Savings Bank*, S. C. Mo., Feb. 23, 1885.

48. STATUTE—*When "may" means "shall."*—The word "may" in a statute means "shall," whenever the rights of the public or third persons depend upon the exercise of the power, or the performance of the duty to which it refers. The word has such meaning in the proviso of § 90 of the Practice Act. *James v. Dexter*, S. C. Ill., Ottawa, Nov. 17, 1884.

49. TAXATION.—*Personal Property out of the State —Stock in Manufacturing Company.*—1. Where St. Louis water bonds owned in this State were, and had been continually, in the City of New York, where they were sent, not for the purpose of avoiding taxation, but in good faith, because the interest was payable there: *Held*, that they were not taxable in this State. 2. Inasmuch as the Statute (section 6992) provides that the property of manufacturing corporations "shall be assessed and taxed as the property of individuals," and the statute nowhere provides that capital stock of such companies shall be assessed and taxed, and as the taxation of the "property," and also of the "capital stock" would be duplicate taxation, *held* that such stock is not taxable.—*Valle v. Zeigler*, S. C. Mo., Feb. 23, 1885.

50. VENDOR'S LIEN.—*Collateral Agreement as Consideration.*— Where the owner of certain lands leased the same for ten years, and subsequently sold them to a purchaser who was aware of the circumstances and existence of the lease, and, at the request of the vendee made a warranty deed to the land to the vendee's wife, taking from him at the time an agreement signed by both the vendee and his wife, recognizing the lease and excepting it from the warranty, and undertaking that if any suit should be brought by the lessee on the covenants of the lease to hold the vendor harmless, and it appears that such agreement was a part of the consideration of the sale, a recovery had by the lessee on such lease will constitute a claim against the vendee and his wife, which will be protected by the vendor's lien. *Williams v. Crow*, S. C. Mo., Feb. 23, 1885.

51. WILL.—*Undue Influence — Devise to Wife of Guardian.*— 1. A devise by a ward to or for the benefit of his guardian in any proceeding to establish or contest the same, is presumed in law to have been procured by the undue influence of the guardian, and the burden of repelling this presumption and thereby establishing or maintaining the devise, rests on those who seek to derive advantage from it. 2. The fact that the devise is not to the guardian, but to the guardian's wife, is in such a case an immaterial distinction. *Birdwell v. Swank*, S. C. Mo., Feb. 23, 1885.

CORRESPONDENCE.

THE ARKANSAS JUDGE AND THE TRAIN ROBBER.

To the Editor of the Central Law Journal:

My attention has just been called to your article of February 27, (20 C. L. J. 161) where, in speaking of "The Campbell Disbarment Case," you use this language: "The *Law Bulletin* does not state whether or not the court pronounced an eulogistic speech on Mr. Campbell *as an Arkansas judge did the other day* in sentencing a train robber. Gab. Pish." Being the only Arkansas judge who has sentenced a train robber for nearly two years, I am interested to know where you got your information. Please cite me to the report of the case which authorizes you to make a statement, not only reflecting upon the judge, but also upon the judiciary of Arkansas. The Arkansas Courts have ever been prompt, not only to *try*, but to *punish* train robbers, as well as all other criminals. Can Missouri say as much? No Arkansas judge has ever pronounced "an eulogistic speech" on a criminal. My remarks in sentencing the train robbers in December last were reported in our daily papers, which can be easily procured. There is nothing in them upon which to base such a charge. As a subscriber for your paper for several years, will you not do me the justice to correct this error? Yours very truly,

F. T. VAUGHAN,
Ct. Judge 6th Ct.

REMARKS.—Our authority for the above statement is the report of the sentencing of the train robbers by Judge Vaughan, which appeared in the Arkansas *Gazette*. What we had reference to was the language which the learned judge is reported to have used in sentencing the robber Clifford. The latter having pleaded guilty, was asked if he had anything to say before receiving his sentence. Then, according to the *Gazette's* account, the following *colloquium* took place:—

"'I've not much to say,' he began. 'I've plead guilty to the charge and I am, but I never would have given up while there was a chance to make our case. I'd have died before I'd have given the boys away. Cook proposed the thing to me first—and—and I went into it with him. The story of the way we did it is pretty well known. We had our meetings and we went down to the track that Saturday night. I threw the switch and when the train ran into it, we boarded her. I had only a little old pistol, with no loads in it, and the boy had nothing at all, but we made a bold bluff at them, and they took it. We parted after the robbery, and Kline and Cook took the sack of stuff. The next time I saw Kline he gave me my share. I never looked at it, but hid it as soon as I could.'

"'*You have acted the part of a man to-day, Clifford,' said the judge. 'You have made a straightforward, manly statement, and you have won the respect of the public; for, however we may deplore your crime, and it is indeed a serious one, I would rather be in your place than in that of some others.* It is the sentence of the court, that you be taken by the sheriff, and by him delivered to the keeper of the penitentiary, and there be confined at hard labor for the term of three years upon the first count in the indictment, and when that term of service shall have expired, you shall be further confined in the penitentiary for four years upon the second count.'"

The italics are ours. We submit to our readers whether we were guilty of a misuse of terms in calling the above "an eulogistic speech." The two forcible words with which we ended our observations on the

Campbell case, were not intended to express our view of the use by the learned judge of the above quoted language. They were intended to express the feeling which we entertained, not for the Arkansas judge, who though eulogizing certain conduct of the prisoner, did his duty, but for the Ohio judges, who shamefully failed to do theirs.

Concerning the manner in which train robbers have been treated in Missouri, we have not one word to say. From first to last it is a record of humiliation and shame, for which nothing can be said in palliation or apology.

QUERIES AND ANSWERS.

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES.

16. When A was fourteen years old he went to live with B. Soon after B, with consent of A's parents, and in connection with them, by deed duly executed, acknowledged and recorded, adopted A as his heir and devisee, under sec. 599, etc., Revised Statutes of Missouri. A lived with B as one of his family, and worked faithfully for him until he was twenty-one years old. Soon thereafter B died, leaving widow and four children and property worth twenty thousand dollars, which he disposed of by will, giving his widow and children equal parts, but giving A only ten dollars, and providing that he should receive nothing more from his estate. Could A recover anything from B's estate? If so, would it be under the deed of adoption or for value of services? JONES.

17. Can a citizen of one State, who casually enters another State and contracts a debt there, claims the protection of the exemption laws of either State? For instance, upon his going again into the State where the debt was made, his creditor there seizes his horse, which is exempt under the laws of both States; can he claim this exemption in the State where the writ of attachment or *fieri facias* is levied? J. B. S.

Osyka, Miss.

18. Does the statute of limitations run against a note or open account under these circumstances: The debt is contracted in one State by the resident of another State, who resided at the time the debt was made, and continues to reside, in another State. Can the debtor plead limitation in the courts of either State?

J. B. S.

Osyka, Miss.

QUERIES ANSWERED.

Query No. 10 [20 C. L. J. 178]. A sues B in Federal court, and has the marshal attach B's goods. B has other creditors, but the Federal court has not jurisdiction of their claims. What is the proper course for them to pursue in order to subject the excess of B's property to the payment of their claims—garnish the marshal, or does the Federal court, by virtue of its having the property in its custody, have jurisdiction, regardless of amounts or residence?

Answer.—A partial answer to the above may be found in the case of Patterson v. Stephenson, 77 Mo. 329, and Bates Co. Nat. Bank v. Owen, 79 Mo. 429, and the authorities therein cited. D. J. HEASTON.

Bethany, Mo.

Query No. 4 [20 C. L. J. 79]. A becomes totally insane in 1864, and has so remained ever since. At the time of becoming insane, he had no family except one son, then about fifteen years of age, who remained at home with his father, taking care of him and his estate with the utmost economy and diligence, devoting his whole time and attention in that direction, until the son died in 1882. Before dying the son assigned his supposed claims against his father, for the services rendered as aforesaid, after he became of age, to the party who cared for him in his last sickness. No guardian was ever appointed for the father before the son died. Has the assignee of the son any claim against the father for these services? No express contract for pay ever was, or could have been made between the father and son, because of the total insanity of the father, and the want of a guardian. Cite authorities.

Answer.—"The relation existing between the parties, as parent and child, step-parent and step-child, brother and sister, and the like, is itself strong negative proof, and raises a presumption that no payment or compensation was to be made beyond that received by claimant at the time, which can only be overcome by clear and unequivocal proof to the contrary." "To establish this * * * * some arrangement or contract to that effect must be shown." Hall v. Finch, 32 Wis. 286. The allowance of such claim "is pregnant with danger, * * * * as well to the right of the creditors as to the other heirs, and cannot, * * * * be entitled to countenance from the court, unless accompanied with clear proof of an agreement, * * * * distinctly thereby manifesting that the relation which subsisted was not the ordinary one of parent and child, but master and servant." Candor's Appeal, 5 W. & S. 515; Abbott's Trial. The same rule prevails where the parent and child continue to live together after the child becomes of age. Fitch v. Peckham, 16 Vt. 156; 17 Vt. 556; 5 Dutcher, 117; 33 N. H. 581. The reasons of the rule are stated to be the preservation of the peace of families, the prevention of strife and controversies which might ensue through the fraud of some and the avarice and litigiousness of others, and the prevention of perjury. 32 Wis. *supra*. The last reasons would seem to be all the stronger in the case of an insane parent. The stepfather of a lunatic, so adjudged on inquisition, was not allowed to claim as a debtor, for what he had expended, beyond the rents of the lunatic's freehold, in the maintainence of the lunatic, it being considered as an act of bounty on his part as the stepfather of the lunatic. Carter v. Beard, 11 Sim. (Eng. Ch. R.) 7. The son having no valid claim against his father, his assignee could have none.

JAMES H. BROWN.

Denver, Colo.

RECENT PUBLICATIONS.

MYER'S FEDERAL DECISIONS. Vol. 6. Federal Decisions. Cases argued and determined in the Supreme, Circuit and District Courts of the United States. Comprising the opinions of those courts from the time of their organization to the present date, together with extracts from the opinions of the Court of Claims and the Attorneys-General, and the opinions of general importance of the territorial courts. Arranged by William G. Myer, author of an Index to the United States Supreme Court Reports; also Indexes to the Reports of Illinois, Ohio, Iowa, Missouri and Tennessee, a Digest of the Texas Reports, and local works on Pleading and Practice. Vol. VI. Constitution and Laws. St. Louis, Mo.: The Gilbert Book Co. 1885.

This volume bears the certificate of approval of Pro-

fessor William G. Hammond, Dean of the St. Louis Law School. Dr. Hammond is a very learned man; was a member of the commission of 1873 which revised the laws of Iowa; is author of a Digest of Iowa Reports, and editor of the second edition of Lieber's Hermeneutics. He is, therefore, quite well qualified for the task of making a critical examination of a literary performance. His mind is essentially critical, and those who know him feel assured that he would not make such a certificate without a thorough examination.

Mr. Myer is building for himself, through the preparation of this work, a high reputation as a bookmaker. The plan of this work, which consists of collecting and reporting anew the leading Federal decisions, arranged according to subjects, and digesting under each sub-title those decisions of less importance, is a novel one; but when it is seen how very convenient such a grouping of decisions is, the wonder is that no one attempted it before.

This volume relates to the subject of Constitutional Law, though it does not complete the subject. We had occasion, on the day this review was written, to look into the subject of "Due Process of Law" in reference to the Fourteenth Amendment. The cases were all here, grouped under the sub-title, "Due Process of Law," the leading decisions reported in full, those of less importance digested merely. Without the aid of this volume, we should have been compelled to ransack our library of Federal Reports, by the aid of a Digest and then to take down volume after volume, in order to make a search for what we were endeavoring to find. We found all the decisions grouped in this one volume in the space of twenty-four pages. Our experience in this one search will be the experience of every lawyer, and judge in his every-day work, who provides himself with this admirable edition of the decisions of the Federal Courts. We venture the prediction that the reports of the States must be republished in this way, grouped according to topics; and we trust that the enterprising publishers and their able and experienced editor will, when they get through their present task, apply the same method to the Reports of some of the States. By pursuing this method, all questions as to infringement of copyright, may generally be avoided; for the opinions are not, as a general rule, the subjects of copyright, and the work of the original reporters would not be copied even to the extent of following their plan of arrangement.

JETSAM AND FLOTSAM.

FACT AND LAW.—Glance a moment, at the men of mark, in court and nation, and be convinced that the corner stone of law practice rests on the contest over facts more than over law points in daily practice. Think out a list of acquaintances or celebrated men like Brady, Voorhees, Tremain, Matthews, Dougherty, Curtis, Beach or Carpenter, and you will be satisfied that one who works in the lower courts for victory, *on the merits*—or the facts, instead of making every court one of last resort, is always in the true line of success. Glance again at the dry, technical lawyers of your acquaintance—men called profound—deep, exhaustive reasoners, (sometimes called so from the very obscurity of their reasoning;) and how many do you know who ever attained eminence in practice that hated juries and the drudgery of preparing facts for trial? In a somewhat extended reading of eminent men,—especially those who have contended for promotion in the courts of our own country during the last third of a century, said an eminent advocate recently, "I have found a few who reached their ambition, but men like Field, Marshall, Crittenden, Choate, Evarts, O'Connor, Campbell, Burr, Benjamin, Seward, Ryan, Davis, Dickinson and Lincoln with a regiment more unnamed, have all won their circuit cases on the facts rather than the law. It is a little singular that in the East, far more is left to the trial judge, and less and less wrangles over law points are yearly indulged in, but more and more directness in the line of evidence. At a swift glance this seems to discourage law study until after the first contest. This is by no means correct. The true theory is (if one may be pardoned for compiling and presenting such a theory), is to be so clear on the law, that you are confident of your positions before trial, and if the judge fails to agree with it, be prepared to go to the courts of last resort for vindication. With this theory, once matured, fifteen out of twenty cases will be earlier won on the merits as they surely will be finally, and the sooner the better. That I am sustained in this position by some of the most eminent counsel, I could verify by their letters, but on questions of fact we must often accept ones word as authority. To those who spurn this view of practice I say keep on, trial will teach you by experience, one could name ten out of twelve who have succeeded best as stated. J. W. DONOVAN.

JOHN K. PORTER.—The New York *Tribune* man who writes the "Notes about Town," came across John K. Porter the other evening, and thus writes about him: "In the Fifth Avenue hotel the other evening I met ex-Judge John K. Porter, looking much grayer but not nearly so old and careworn as he looked during the Guiteau trial, nor any older, I thought, than when he appeared in the Tilton-Beecher suit eight years ago. I remarked his improved appearance, and he explained it by saying that since the trial of the assassin of President Garfield he had retired from his profession and was resting, living in the summer at his place on Schroon Lake, in the spring and fall at Waterford, near Saratoga Springs, and in the winter at the Fifth Avenue hotel, three pleasant resorts in their seasons. It has been the peculiar experience of Judge Porter to be engaged in many suits which occupied a great deal of time in their trials and involved many new and complex questions of law. He was in the Beecher case for six months; his health broke down under the strain. The Guiteau trial lasted several weeks. He was referee in the famous Navarro suit against the city, the hearing of testimony in which occupied nearly a year, and the various appeals in which took up quite ten years. The judge was in excellent humor over the decision of the highest court in the Navarro case. The General Term overruled his decision as referee, and the Court of Appeals reversed the General Term ruling.

THE DEFENSE IN THE TILTON-BEECHER CASE.—The *Tribune* writer talked with Judge Porter about the Beecher case. "I asked him what he thought the most dramatic incident in that extraordinary trial. "The taking the oath by Mr. Beecher," he replied. Without intending to compliment the judge I said that his own sudden and unexpected denunciation of Moulton as a false witness and false friend was the finest instance of crushing invective I had ever heard. That led to the curious revelation that in the first consultations of Mr. Beecher's counsel, Mr. Evarts, the senior counsel, favored an amiable policy in defense, taking the ground that all the persons concerned misunderstood each other. But Judge Porter held that there was a conspiracy to blackmail, and that Tilton must be put on his defense, and the defense of Mr. Beecher finally assumed the shape of a vigorous attack on the complainant and his principal witness."